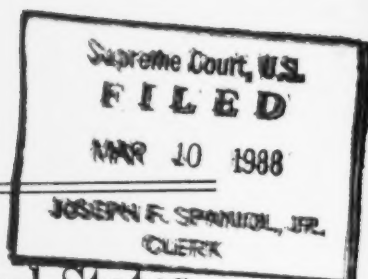


87-1508

No.



In The
Supreme Court of the United States

October Term, 1987

BEAN DREDGING CORPORATION,

Petitioner,

vs.

MARTHA B. OLSEN, COMMISSIONER
OF REVENUE OF THE STATE OF TENNESSEE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE
WESTERN GRAND DIVISION
AT JACKSON**

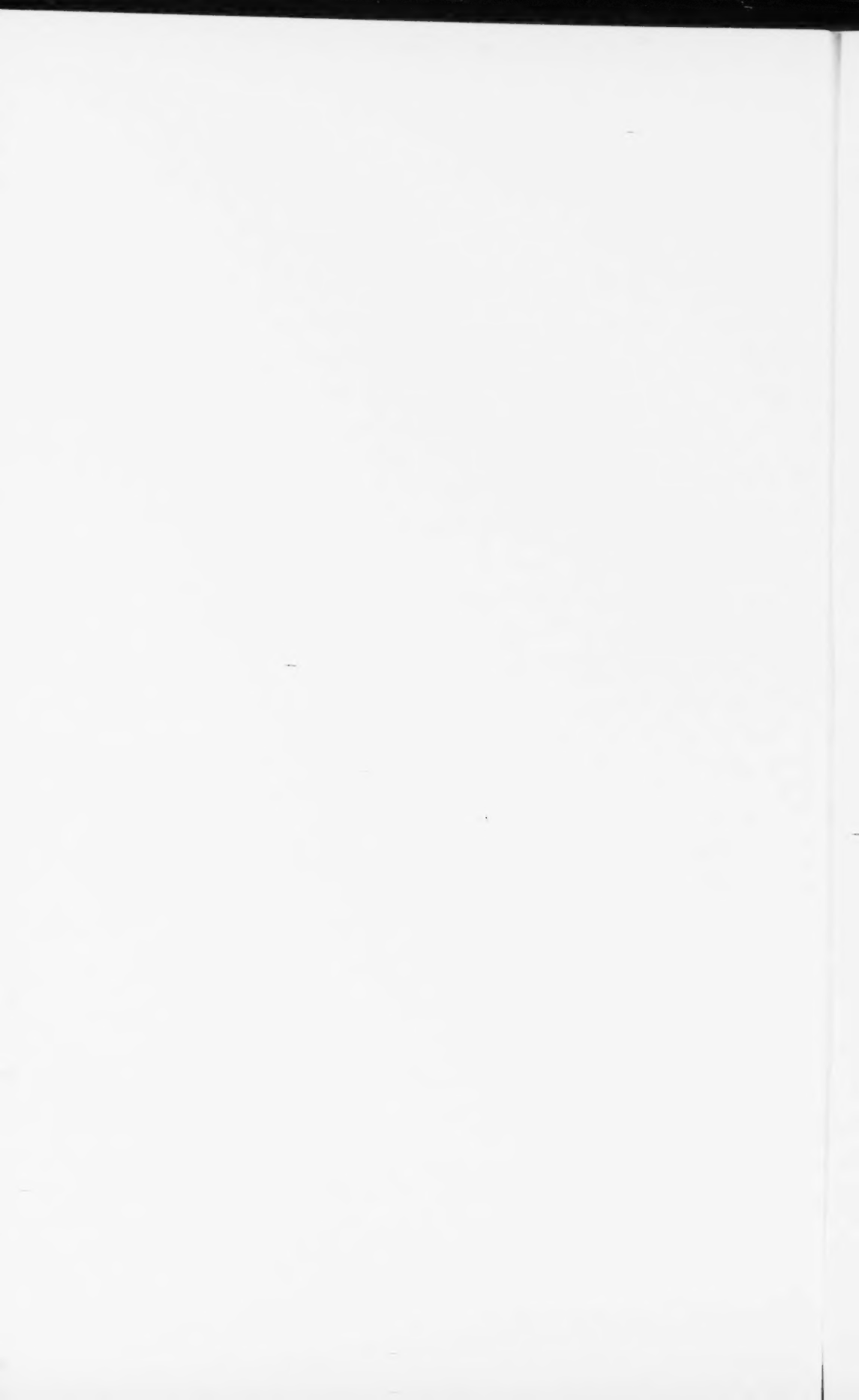
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QUESTION PRESENTED FOR REVIEW

Whether the Tennessee Supreme Court's reversal of the Judgment of the Chancery Court for Shelby County, Tennessee, and the Tennessee Supreme Court's interpretation of certain provisions of the Tennessee Sales and Use Tax Laws, violates the Commerce Clause of the United States Constitution.

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MARTHA B. OLSEN, COMMISSIONER
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**PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE
WESTERN GRAND DIVISION
AT JACKSON**

Petitioner prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Tennessee, Western Grand Division at Jackson, entered in these proceedings on December 14, 1987.

OPINIONS BELOW

The Judgment and Opinion of the Tennessee Supreme Court at Jackson are reproduced, respectively, at Appendix 1 and 2 of this Petition.

The Final Decree and Memorandum Opinion (unpublished) of the Chancery Court for Shelby County, Tennessee, are reproduced at Appendix 36 through 40 of this Petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). The Judgment of the Tennessee Supreme Court at Jackson was entered on December 14, 1987. This Petition is timely filed pursuant to 28 U.S.C. § 2101(e).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .
U.S. Const. Art. I, § 8, cl. 3.

United States Code

Title 33 U.S.C. §§ 1, 4, 419, 622(a) and (b) are reproduced *in globo* at Appendix 273 through 277 of this Petition.

Tennessee Statutes

Tennessee Sales and Use Tax Laws, Tenn. Code Ann. tit. 67, §§ 67-6-101 through 67-6-712 (formerly codified as Tenn. Code Ann. §§ 67-3001 through 67-3048) are reproduced *in globo* at Appendix 88 through 273 of this Petition.

STATEMENT OF THE CASE

This case presents the question whether the Tennessee Supreme Court's reversal of the Judgment of the Chancery Court for Shelby County, Tennessee, and the Tennessee Supreme Court's interpretation of certain provisions of the Tennessee Sales and Use Tax Laws, violates the Commerce Clause of the United States Constitution. U.S. Const. Art. I, § 8, cl. 3.

The facts of the case are not in dispute, although the legal conclusions drawn from the facts by the Tennessee Supreme Court and the ramifications for the free flow of interstate commerce are of the essence of this Petition.

Petitioner, Bean Dredging Corporation, is a Louisiana corporation primarily engaged in the dredging and maintenance of various navigable waterways, including the Mississippi River.

Petitioner owns and operates the vessel *Lenel Bean*, a self-propelled dustpan dredge, independently capable of navigation, propulsion and storage. A dustpan dredge sucks dredge material up through a pan in the front of the vessel and transports the material through a pipeline out to a spoil or discharge area. A dustpan dredge, by its

nature, is constantly in motion while dredging activities are conducted. A dustpan dredge is suited to dredging activity normally associated with maintenance of ship channels in rivers and streams. The *Lenel Bean's* attendant plant handles pipeline, barges and anchors, and carries supplies and personnel to monitor the shoal before, during and after the dredging process. The *Lenel Bean* was specifically designed for maintenance of the Mississippi River and is unique to private industry, with all other dustpan dredges in the United States being owned by the United States Corps of Engineers. By contrast, the vast majority of "cutterhead" and all "clam shell" dredges are stationary at all times during dredging activities and are suited more particularly to harbor maintenance and excavation, none of which occurred in this case.

The United States Corps of Engineers has exclusive police power to prescribe rules and regulations for the use, administration and navigation of the navigable waters of the United States, including the Mississippi River, and the jurisdiction of the Corps of Engineers covers, *inter alia*, channel maintenance, uninterrupted gauging of the waters, dredging and dumping to preserve the free flow of navigation. 33 U.S.C. §§ 1, 4 and 419. The Corps of Engineers is authorized to carry out projects for the improvement of rivers and harbors in the manner most economical to the United States and may contract with private industry to perform the work if it can be done timely and at reasonable prices. 33 U.S.C. § 622(a). Although the Corps of Engineers maintains a federally owned fleet of dredges, as private industry demonstrates its ability to

perform the same function as the federal fleet in a timely and cost-effective manner, the Corps of Engineers has received a Congressional mandate to contract with private industry to perform dredging activities to reduce the size of the federally owned fleet of dredges. 33 U.S.C. § 622(b).

Pursuant to this Congressional mandate, the Corps of Engineers contracted with Petitioner during the years 1980 through 1982 for the use of the *Lenel Bean* to perform dredging operations to the specifications of the Corps between Mississippi River Mile 599 and River Mile 800, and to remain at all times on standby ready to proceed on five days notice by the Corps. Mississippi River Mile 599 marks the southern boundary of the Memphis District of the Corps of Engineers and is located south of the Tennessee state line at the mouth of the White River in Arkansas. Mississippi River Mile 800 is immediately upstream from Osceola, Arkansas. Thus, it was necessary for the *Lenel Bean* to navigate upon the Mississippi River and cross state lines on a daily basis in order to perform its contractual commitments to the U.S. Government. Furthermore, in order to monitor the vessel's position, a number of shore stations were set up on each bank of the river in different states in order to transmit and receive radio signals to and from the dredge and the computer on board to maintain proper position in the river. It was not unusual for the *Lenel Bean* to remove dredge material from one state and deposit the same material in a different state as part of its daily activities. In fact, the contract covered dredging responsibilities in the State of Arkansas in twelve different counties, in the State of Mississippi in ten different counties, as well as in the State of Tennessee in sixteen different counties.

Pursuant to the contract between Petitioner and the U.S. Corps of Engineers, the Corps of Engineers at all times designated the area of the river to be dredged, the quantity of material to be removed and transported and the precise disposal area. Pursuant to the federal contract, Petitioner transported Corps of Engineers radios, equipment and personnel to and from Petitioner's vessels from all points on shore designated by the Corps and provided Corps personnel with meals and accommodations.

The ship channels of the Mississippi River undergo continuous change as a result of the constant deposit of silt and shoal material. Consequently, dredging activities to maintain the ship channel cannot precisely be determined in advance but must occur over an extended period of time and the decisions made by the U.S. Corps of Engineers as to the location of dredging activities, the amount of material to be removed and the placement of the spoil must be made as the work progresses, with dredging assignments subject to continuous modification and adjustment. Accordingly, dredging assignments were often upstream, downstream and at non-contiguous locations. As soon as work was completed at one site, the dredge was required by the Corps of Engineers to relocate to another site to commence a new assignment. At all times, Petitioner was required to mobilize to an assigned location within five days notice from the Corps of Engineers.

During periods of high water, Petitioner was required by the Corps of Engineers to remain on standby but be prepared to dredge where, when and as directed on five days notice. Petitioner arbitrarily chose McKellar Lake, a navigable harbor on the Mississippi River, because it

was the most convenient harbor to the section of the river for which Petitioner was responsible. Petitioner was obligated to maintain the vessel in a state of readiness at all times. Necessary crew were kept on board. Required lines, lights and safety checks were tested, and engines and equipment were maintained in a state of readiness. Vessel generators and electrical systems were operated at all times and vessel documents and licenses were maintained in order to keep the vessel available on five days notice to respond to the requirements of the U.S. Corps of Engineers pursuant to the federal contract.

The Commissioner of Revenue of the State of Tennessee assessed Petitioner with use tax levied on the *Lenel Bean* and its attendant plant for the period from January 1, 1980 to December 31, 1982. On August 18, 1983, Petitioner paid under protest \$400,037.41 of Tennessee use taxes, \$71,505.67 of interest and \$100,009.35 of penalties. Appendix 84 and 85.

Petitioner timely filed a suit for refund on December 14, 1983, alleging exemption under applicable Tennessee tax statutes and further alleging, *inter alia*, as follows:

The imposition of use taxes by the State of Tennessee on dredging vessels used in interstate commerce with-in and without this State is an unconstitutional encroachment on the power of the Congress of the United States to regulate commerce among the several states

under Article I, Section 8 of the United States Constitution.

See Appendix 80, Par. 13.

Trial was held on May 6, 1986, in Part III of the Chancery Court of Shelby County before the Honorable Chancellor D.J. Alissandratos and Judgment was rendered on the same day. The Chancellor found, as a matter of fact, that Petitioner, at all times in question, was engaged in interstate commerce and that its entire activity, including intermittent and sporadic standby time at Lake McKellar at the direction of the U.S. Corps of Engineers, was for the furtherance and preservation of the navigation of the entire Mississippi River waterway. Accordingly, the Chancellor ordered that the State of Tennessee must refund to Petitioner a total of \$571,552.43 of use tax, interest and penalty, together with applicable interest. Appendix 37.

The State of Tennessee appealed directly to the Tennessee Supreme Court according to applicable state law. On December 14, 1987, the Tennessee Supreme Court entered a Judgment reversing the Judgment of the Chancery Court for Shelby County, Tennessee. Appendix 1.

ARGUMENT

THE TENNESSEE SUPREME COURT'S REVERSAL OF THE JUDGMENT OF THE CHANCERY COURT FOR SHELBY COUNTY, TENNESSEE, AND THE TENNESSEE SUPREME COURT'S INTERPRETATION OF CERTAIN PROVISIONS OF THE TENNESSEE SALES AND USE TAX LAWS, VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

I. Petitioner was engaged in interstate commerce at all times.

The Tennessee Sales and Use Tax Laws specifically exempt from sales and use tax vessels and barges of fifty tons or over of displacement which are purchased for use in interstate commerce or for use outside of the State of Tennessee, so long as such vessels are being used in interstate commerce. Tenn. Code Ann. § 67-6-321 (formerly Tenn. Code Ann. § 67-3012).

This case was the first opportunity for the Tennessee courts to apply the Tennessee Sales and Use Tax Laws to dredging activities. The only prior occasion where a Tennessee court applied the statute with regard to maritime activities generally was in *T. L. Herbert & Sons, Inc. v. Woods*, 539 S.W. 2d 28 (Tenn. 1976), where the Tennessee Supreme Court ruled that a towboat purchased in Louisiana and brought to Tennessee to service the Nashville harbor was exempt from Tennessee use tax since it was engaged in interstate commerce, even though the vessel rarely, if ever, ventured outside the territorial waters of the State of Tennessee, had come to rest within the state and become part of the mass of property used in Tennessee.

In its original complaint, Petitioner pled the provisions of the Commerce Clause. However, its protections should not have been necessary in view of the clear authority provided by the Tennessee Sales and Use Tax statute, particularly Tenn. Code Ann. § 67-6-313(a) (formerly Tenn. Code Ann. § 67-3007), as well as the holding in *Herbert*. Accordingly, in its argument at trial and on appeal to the Tennessee Supreme Court, Petitioner stressed the Tennessee statutory provisions and their interpretation by the Tennessee Supreme Court in *Herbert*. The Tennessee statutory provisions and the prior holding in *Herbert* were consistent with the principles of the Commerce Clause.

The Tennessee Supreme Court erroneously reversed the Judgment of the Chancery Court of Shelby County despite the compelling facts of the case, the clear directive of the Tennessee Sales and Use Tax statute and its own prior precedent, based upon a novel and, we respectfully submit, unsophisticated view of dredging as inherently local, analogous to the repair of an interstate highway.

In interpreting and applying the Tennessee Sales and Use Tax Laws, the Tennessee Supreme Court ignored the fact that the maritime dredging industry involves a number of varied types of activities, some of which are not susceptible to expedient classification as inherently "local."

The *Lenel Bean* was specifically designed, maintained and operated to keep ship channels of the Mississippi River navigable. The dredge is called upon to move from place to place along the river where, when and as needed, and the vessel is in constant movement during dredging operations.

Conversely, harbor excavation or construction dredging activities involve dredges of completely different design and operation. These dredges, known as "clam shell," "bucket" and "cutterhead" dredges, remain fully stationary at all times and remove dredged material in predetermined amounts and locations.

The Tennessee Supreme Court failed to make any distinction whatsoever between these two types of dredging activities and cited as its authority for the local nature of dredging activities a number of cases, each of which involved stationary harbor maintenance or construction activity, and none of which involved dustpan dredge activity. See, for example, *Great Lakes Dredge & Dock Co. v. Department of Taxation and Finance*, 39 N.Y.2d 75, 346 N.E.2d 796, 382 N.Y.S.2d 958 (1976), *cert. denied*, 429 U.S. 832 (1976); *Atlantic Gulf & Pacific Co. v. Gerosa*, 16 N.Y.2d 1, 209 N.E.2d 86, 261 N.Y.S.2d 32 (1965), *appeal dismissed*, 382 U.S. 368 (1965); *Great Lakes Dredge & Dock Co. v. Norberg*, 117 R.I. 600, 369 A.2d 1101 (1977); and *Diversacon Industries, Inc. v. Graham*, 429 So.2d 1269 (Fla. App. 1983), cited by the Tennessee Supreme Court.

Petitioner was engaged in interstate commerce on a continuous basis at all times material hereto. Prior efforts of state taxing authorities to unlawfully tax interstate commerce, supported by opinions of the taxing state's highest court that the activity taxed is inherently "local" and thus immune from Constitutional protection, have been struck down as violative of the Commerce Clause. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 98 L.Ed. 583, 74 S.Ct. 396 (1954). Additionally, the fact that Petitioner's vessel remained on standby in Lake

McKellar awaiting further instructions of the Corps of Engineers, does not remove the vessel from interstate commerce, since this activity is so integrated with Petitioner's dredging activities that it is insusceptible of realistic division into a separate and distinct local activity capable of forming a basis for taxation, in much the same way that receiving and landing passengers and freight may not be isolated from their transportation in interstate commerce or the momentary storage or treatment of natural gas may not be segregated from its ultimate transmission through an interstate pipeline. See, *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 98 L.Ed. 583, 74 S.Ct. 396 (1954); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 29 L.Ed. 158, 5 S.Ct. 826 (1885); *Maryland v. Louisiana*, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981).

This Court has long ago rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause analysis because it attaches only to a "local" or alleged intrastate activity. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981).

Consequently, the decision of the Tennessee Supreme Court in this case results in the imposition on Petitioner of a use tax on interstate commerce which violates the Commerce Clause of the United States Constitution. A review by the Court is necessary and appropriate.

II. The Commerce Clause prohibits the tax.

Although it is well settled that "interstate commerce may be made to pay its way" and that a state tax on interstate commerce is not per se invalid, a state's right

to tax interstate commerce is limited and must not be sustained unless the tax: (a) has a substantial nexus with the State; (b) is fairly apportioned; (c) does not discriminate against interstate commerce; and (d) is fairly related to the services provided by the taxing state. *Maryland v. Louisiana*, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977); and *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977). Failure of any one or more of these four tests renders the tax unconstitutional as violative of the Commerce Clause. The tax as applied by the Tennessee Supreme Court in this case fails three of the four tests, namely, it is not fairly apportioned, it discriminates against interstate commerce and is not fairly related to the services provided by the taxing state.

A. The tax is not fairly apportioned.

Although the *Lenel Bean* routinely entered into the States of Arkansas and Mississippi as well as the State of Tennessee and moved dredged material from one state to another across state lines on a constant basis, all at the direction of the Corps of Engineers, the Tennessee use tax is based upon the "cost price" of the entire dredge without any allocation, exemption, deduction or credit for use of the vessel outside of the State of Tennessee. Tenn. Code Ann. § 67-6-203 (formerly Tenn. Code Ann. § 67-3003). The Tennessee Sales and Use Tax Laws provide no protection to Petitioner against a similar, duplicative tax by either Mississippi, Arkansas, or both.

It is well settled that a state tax on interstate commerce must be fairly apportioned and limited to the taxed

property's use within the taxing state in order to supersede the Constitutional protection of the Commerce Clause. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 82 L.Ed. 823, 58 S.Ct. 546 (1938); *Maryland v. Louisiana*, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981). The nature of Petitioner's dredging activities exposes Petitioner to multiple state use taxation and the imposition of tax by any of the states would renew barriers to interstate commerce which the Commerce Clause was designed to remove. See, *Western Live Stock*, *supra*, and the jurisprudence cited therein. This Court has upheld State taxation of interstate commerce, but only where the state statute limited the tax to activities within its borders. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977); *Portland Cement Co. v. Minnesota*, 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357 (1959); *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 55 L.Ed.2d 682, 98 S.Ct. 1388 (1978); *Western Live Stock*, 303 U.S. 250, 82 L.Ed.2d 823, 58 S.Ct. 546 (1938); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981); *American Trucking Assns. v. Scheiner*, 483 U.S. —, 97 L.Ed.2d 226, 107 S.Ct. 2829 (1987).

B. The tax discriminates against interstate commerce.

The Tennessee Supreme Court's failure to follow its own holding in *T.L. Herbert & Sons v. Woods*, 539 S.W.2d 28 (Tenn. 1976) and its erroneous classification of all dredging activities as inherently "local" have resulted in a direct discrimination against interstate commerce.

In *Herbert*, the taxpayer, a *Tennessee corporation*, purchased a towboat in Louisiana which, under Louisiana law, was exempt from Louisiana sales tax. The towboat was brought into the State of Tennessee to engage in towing activities in Nashville harbor, rarely, if ever, leaving the State of Tennessee. The Tennessee Supreme Court found that the activities in the harbor were local and even went so far as to find that the boat came to rest in Tennessee and became part of the taxable mass of property used there. Nevertheless, the Tennessee Supreme Court easily concluded that the towboat was at all times in interstate commerce and that the taxpayer, a *Tennessee corporation*, owed no use tax since the activities were within the statutory exemption.

Petitioner, a *Louisiana corporation*, acquired the *Lenel Bean* under an exemption from Louisiana sales tax. Petitioner entered into a federal contract with the Corps of Engineers to dredge the Mississippi River across state lines on a continuous basis and to remain on standby to proceed on five days notice by the Corps. By pure happenstance, Petitioner selected McKellar Lake as the most convenient place to remain on standby and still fulfill its continuing obligations to the Corps. In applying the same statute as in *Herbert* to Petitioner, a *Louisiana taxpayer*, the Tennessee Supreme Court ignored the compelling facts of this case and erroneously misclassified Petitioner's dredging activities as inherently local and Petitioner's standby time as removal from interstate commerce. The holding of the Tennessee Supreme Court and the reasons for judgment are bootstrap arguments. This result-oriented interpretation of Tennessee law is nothing more

than a diaphonous effort by the State of Tennessee to discriminate against interstate commerce, in general, and against Petitioner, in particular, all in violation of the Commerce Clause.

The obvious economic result of the holding of the Tennessee Supreme Court is to encourage out-of-state maritime and dredging contractors to relocate operations in Tennessee by protecting in-state business from tax, while discouraging out-of-state competition. No state may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business. Equal treatment for in-state and out-of-state taxpayers similarly situated is a condition precedent to a valid state use tax on property imported from out-of-state. *Best & Co. v. Maxwell*, 311 U.S. 454, 85 L.Ed. 275, 61 S.Ct. 334 (1940); *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 10 L.Ed.2d 202, 83 S.Ct. 1201 (1963); *Portland Cement Co. v. Minnesota*, 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357 (1959); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977); *Maryland v. Louisiana*, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 80 L.Ed.2d 388, 104 S.Ct. 1856 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638, 81 L.Ed.2d 540, 104 S.Ct. 2620 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 82 L.Ed.2d 200, 104 S.Ct. 3049 (1984).

C. The Tax is not fairly related to the services provided by Tennessee.

Petitioner's contract with the U.S. Corps of Engineers was funded federally, not by the taxpayers of the

State of Tennessee. At all times, Petitioner was subject to the direct control and supervision of the federal government through the Corps of Engineers. The activities of Petitioner aided navigation for the entire Mississippi River and thus benefitted the economies of every state in the Mississippi River Valley. The position of McKellar Lake within the boundaries of the State of Tennessee was entirely serendipitous. While on standby in McKellar Lake, Petitioner paid all applicable sales tax to the State of Tennessee for vessel repairs, supplies, maintenance, etc. Thus, Petitioner's debt to the State of Tennessee was fully discharged. It paid all sales taxes rationally related to any services provided to Petitioner while in the state such as police and fire protection, the furnishing of a trained work force and the "advantages of a civilized society." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981). Imposition of an additional use tax as a percentage of the entire value of the *Lenel Bean* and its attendant plant cannot be rationalized as just compensation to the State of Tennessee, as opposed to the States of Arkansas and/or Mississippi or any other state in the Mississippi Valley. Such additional tax would be disproportionate and in clear violation of the Commerce Clause. *Armco, Inc. v. Hardesty*, 467 U.S. 638, 81 L.Ed.2d 540, 104 S.Ct. 2620 (1984).

In order to justify a use tax on interstate commerce as a compensatory tax, the state must first identify the burden on state government to be compensated. A state cannot satisfy this requirement if the use tax operates in a discriminatory manner. *Maryland v. Louisiana*, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981); *Tyler*

Pipe Industries v. Department of Revenue, 483 U.S. —, 97 L.Ed.2d 199, 107 S.Ct. 2810 (1987). When the measure of a tax bears no relationship to the taxpayer's presence or activities in a state, the tax is an undue burden on interstate commerce. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981).

CONCLUSION

The Tennessee Supreme Court's reversal of the Judgment of the Chancery Court for Shelby County, Tennessee, and its imposition of Tennessee use tax on Petitioner violates the Commerce Clause of the United States Constitution.

As in *Great A & P Tea Co. v. Cottrell*, 424 U.S. 366, 47 L.Ed. 2d 55, 96 S.Ct. 923 (1976), we begin with the principle that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330, 88 L.Ed. 1304, 64 S.Ct. 1023 (1944). It is now established beyond dispute that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman v. Hewit*, 329 U.S. 249, 252, 91 L.Ed. 265, 67 S.Ct. 274 (1946). The Commerce Clause does not, however, eclipse the reserved "power of the States to tax for the support of their own governments," *Gibbons v. Ogden*, 9 Wheat. 1, 199, 6 L.Ed. 23 (1824), or for other purposes, cf. *United States v. Sanchez*, 340 U.S.

42, 44-45, 95 L.Ed. 47, 71 S.Ct. 108 (1950); rather, the Clause is a limit on state power. *Defining that limit has been the continuing task of this Court.*

Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 328, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977) (emphasis added).

Thus, the Tennessee use tax, as applied in this case, fails three of the four tests set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977) and, consequently, the tax violates the Commerce Clause.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

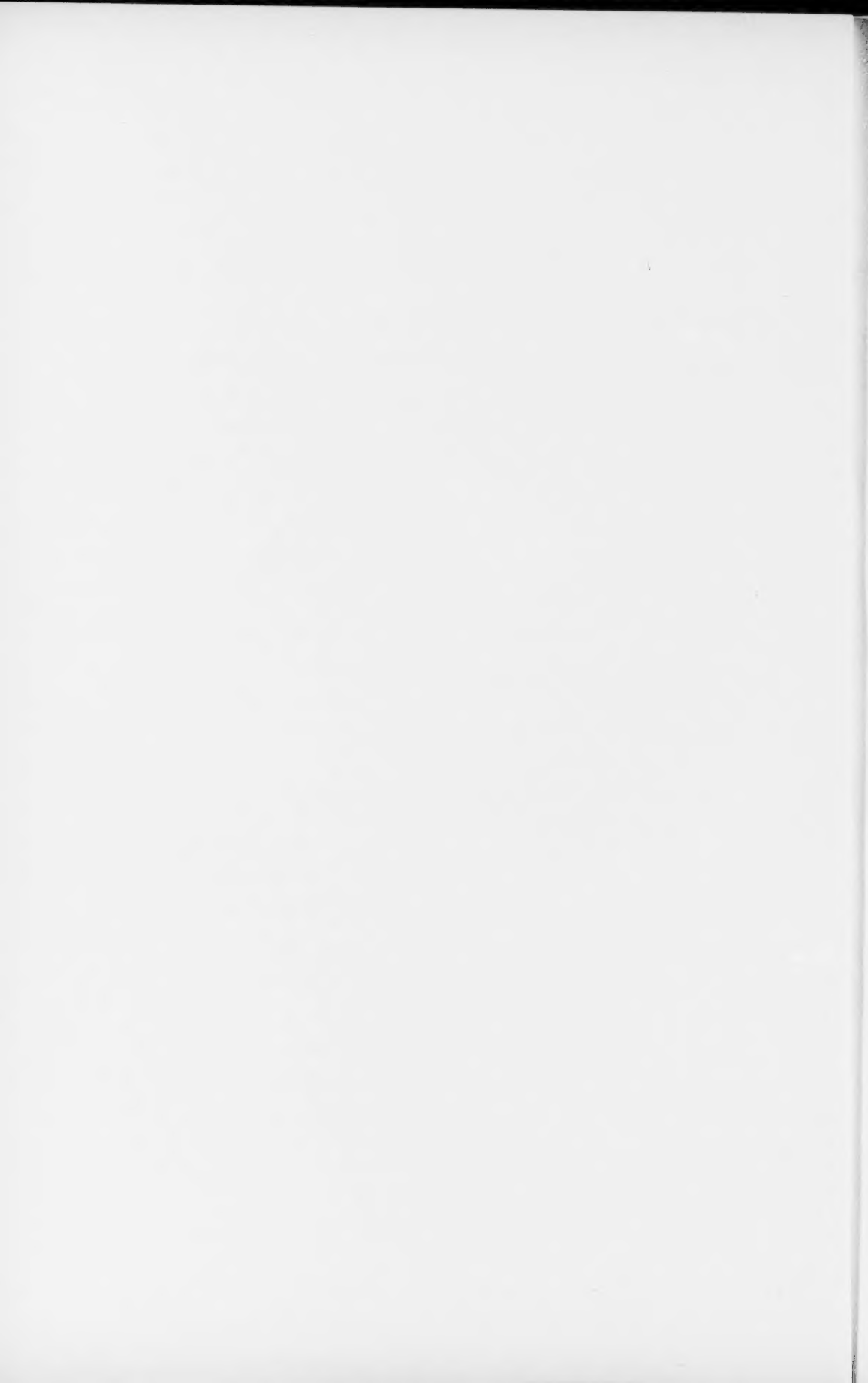
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App. 1

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

BEAN DREDGING)	
CORPORATION,)	
	)	SHELBY
Plaintiff-Appellee,	)	EQUITY NO. 1
	)	No. 90712-2(3) R.D.
vs.)	
	)	REVERSED
MARTHA B. OLSEN,	)	IN PART;
COMMISSIONER OF	)	CAUSE
REVENUE, STATE OF	)	REMANDED.
TENNESSEE,)	
)	
Defendant-Appellant.)	

J U D G M E N T

(Filed Dec. 14, 1987)

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Shelby County, briefs and argument of counsel; upon consideration whereof, this Court is of opinion that in the judgment of the Court below there is reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and adjudged by this Court that the judgment of the Court below be reversed in part and the cause remanded to the Chancery Court of Shelby County for further proceedings not inconsistent with this Court's opinion, a certified copy of which will accompany the mandate on the remand.

Costs are taxed against the appellee, Bean Dredging Company, for which execution may issue.

12/14/87.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

BEAN DREGING
CORPORATION,

Plaintiff/Appellee,

vs.

MARTHA B. OLSEN, Commis-
sioner of Revenue, State of
Tennessee,

Defendant/Appellant.

For publication.

)
) December 14, 1987
)
)

) Shelby Equity No. 1

) Hon. D. J.

) Alissandratos,
) Chancellor.
)
)
)

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OPINION

(Filed December 14, 1987)

REVERSED IN PART:

CAUSE REMANDED.

HARBISON, J.

Appellee paid under protest and sued for refund of a use tax levied by the State upon a large dredge and a number of supporting vessels which appellee operated and docked on the Mississippi River within the borders of the

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state. Exemption was claimed upon the basis that the equipment was being used in interstate commerce at all times during the tax years involved within the meaning of T.C.A. § 67-6-321.

The Chancellor allowed the exemption and ordered a refund. We reverse except for a small portion of the claim as stated later in this opinion.

The principal vessel, the *Lenel Bean*, is a self-propelled "dustpan" dredge of some 1,385 tons displacement. It was newly commissioned in 1979. Appellee paid neither a sales nor a use tax upon the purchase price of this vessel or upon any of the other supporting units involved in the case with one exception noted hereinafter.

During the three tax years involved in this case, 1980 through 1982, appellee held a large dredging contract with the United States Army Corps of Engineers, under which appellee was to dredge the channel of the Mississippi River between specific mile stations. The southerly terminal point lay south of the Tennessee state line at the mouth of the White River in Arkansas and the northerly one just upstream from Oceola, Arkansas. A significant portion of the territory lay within the borders of Tennessee.

The boundary between Tennessee and Arkansas lies generally in the Mississippi River; but because of shifts in the course of the river over many years, for some distance north of Memphis the river lies entirely within the boundaries of Tennessee. South of Memphis the state boundary runs generally down the middle of the river.

The navigation channel crosses from one side of the river to the other, and it frequently becomes clogged with

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silt and spoil. Under its contract with the Corps, appellee was to keep the channel dredged during its contract period, the operations usually being conducted when the river was at low level. During periods of high water, the dredge and its accompanying vessels were not used. For several weeks during each of the tax years involved here, the equipment was docked in an old river segment, or oxbow lake, known as McKellar Lake, which lies entirely within the boundaries of Shelby County, Tennessee.

Each of the contracts which appellee held with the Corps was for a one-year period. All of the operations of appellee were conducted at the direction of and under the supervision of Corps personnel. The design of the *Lenel Bean* was such that it dredged or vacuumed silt from the bottom of the navigation channel and pumped it out along a pipeline of about 1000 feet in length, lying across some twenty barges to "spoil" areas designated by the Corps of Engineers.

At no time during the three-year period involved here was the *Lenel Bean* or any of the other vessels dry-docked or taken completely out of service. There were significant periods of time during each year, however, when they were not in use in the dredging operations and when they were stored in McKellar Lake. During periods while the equipment was at anchor, maintenance and repairs would be performed as needed, although, as previously stated, the *Lenel Bean* itself was a very new and modern vessel. During protracted periods of docking, many members of the crew would be given leave and only a skeleton crew maintained aboard the equipment. At full strength

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the *Lenel Bean* carried a crew of forty-five to forty-seven persons.

Undisputed testimony shows that the equipment was idle at the dock at McKellar Lake during the following periods:

May 27, 1980 through June 30, 1980
August 22, 1980 through August 31, 1980
November 7, 1980 through November 17, 1980
June 2, 1981 through July 19, 1981
November 1, 1981 through August 6, 1982
September 23, 1982 through December 31, 1982

The equipment was first brought into Tennessee territory on May 27, 1980. It is apparent from the dates listed above that there was one continuous period of over nine months, from November 1, 1981 through August 6, 1982, when the equipment was at anchor in McKellar Lake. Testimony at trial indicated that there was a long period of high water at that time when no dredging operations were required.

The contract between appellee and the Corps of Engineers required that the equipment be maintained in such a state of readiness that it could be dispatched within five days to any site within the contracted territory. While at anchor, the generators on the *Lenel Bean* supplied the units with power at all times; and the engines were started at least once each week to assure that they were in operating condition.

Appellee concedes that the operation of its property within Tennessee territory during the tax years involved was clearly sufficient to subject it to the taxing power of the state. There is no claim of exemption under the

Commerce Clause of the United States Constitution. Appellee relies solely upon the exemption contained in T.C.A. § 67-6-321 as follows:

There shall be exempt from sales tax the transfer, by any dealer in personal property, of railroad rolling stock or of vessels or barges of fifty (50) tons or over of displacement where the purchaser gives the seller an affidavit that such vessels or rolling stock are being purchased for use in interstate commerce or outside the state of Tennessee; and any such vessel or rolling stock shall also be exempt from use tax so long as it is being used in interstate commerce."

The principal case construing this statutory exemption is *T.L. Herbert & Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976).

In that case a towboat had been brought to the port of Nashville. The brief factual record before the Court, however, clearly showed that at all times the vessel was used in interstate commercial towing operations. There was no showing of any sustained period of idleness, and such facts as were adduced in summary judgment proceedings showed that at all times the vessel was used to transport cargo moving in interstate commerce.

Under those facts it was held that the vessel was exempt from the Tennessee use tax.

The facts of the present case are quite different. Appellee insists that when the vessel was actually engaged in dredging the river channel, it was engaged in interstate commerce. The Chancellor so held. As pointed out in the brief of appellant, there is substantial authority to the contrary. Numerous cases hold that dredging operations are local in nature and that they are not, in and of them-

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selves, considered to be interstate commerce for the purposes of state and local taxation.

The facts of the present case are unusual, of course, in that the state line between Tennessee and Arkansas lies within the banks of the Mississippi River in parts of the contracted territory. The proof shows that at some times the dredge itself would be operating within Tennessee but that the designated spoil area at the end of the pipeline would lie in Arkansas. There is no question, however, that in the area north of Memphis both banks of the river now lie in Tennessee, and the entire operations in that area would take place within the boundaries of Tennessee.

One of the principal cases relied upon by appellant, holding that dredging operations are subject to local use taxes, is *Great Lakes Dredge & Dock Co. v. Department of Taxation and Finance*, 39 N.Y.2d 75, 346 N.E.2d 796, 382 N.Y.S.2d 958 (1976); *cert. denied*, 429 U.S. 832 (1976). See also *Atlantic Gulf & Pacific Co. v. Gerosa*, 16 N.Y.2d 1, 209 N.E.2d 86, 261 N.Y.S.2d 32 (1965), *appeal dismissed*, 382 U.S. 368 (1965); *Great Lakes Dredge & Dock Co. v. Norberg*, 369 A.2d 1101 (R.I. 1977). A use tax was also upheld in the State of Florida in *Diversacon Industries, Inc. v. Graham*, 429 So.2d 1269 (Fla. App. 1983).

Many of these cases deal with the constitutional power of a state to levy a use tax; but, as previously stated, no such issue is presented here. It is clear from the factual record that the equipment involved in this case was not at all times engaged in interstate operations, since during at least part of the time it was operating wholly within the boundaries of Tennessee. We believe appellant cor-

rectly analogizes the dredging of a channel to the building of a road or bridge. Servicing an artery of interstate commerce is different from the actual transporting of goods through such an artery from the standpoint of state taxation.

Even if appellee's dredging operations could be classified as interstate commerce, however, obviously there were substantial periods of time during which the equipment was not so engaged but was at dock or storage in Shelby County.

T.C.A. § 67-6-211 provides that a tax is to be levied on

“... the use, the consumption, the distribution, and the storage to be used or consumed in this state of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.”

The term “use” is defined at T.C.A. § 67-6-102(18) as follows:

“... the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of property in the regular course of business. . . .”

The term “storage” is defined in T.C.A. § 67-6-102 (16) as:

“... any keeping or retention in this state of tangible personal property for use or consumption in this state, or for any purpose other than sale at retail in the regular course of business. . . .”

In our opinion the facts of this case show that the equipment of appellee was stored in Tennessee, within the

meaning of these statutes, for substantial periods of time during each of the tax years in question.

The case, in our opinion, is controlled by the decision in *Vector Company v. Benson*, 491 S.W.2d 612 (Tenn. 1973), where a company engaged in interstate commerce acquired a plane to use in business travel. Most of the flights of the plane were interstate. When not in operation, however, the plane was tied down or hangered at a Knoxville airport. A use tax assessment was sustained in that case and in the more recent case of *Service Merchandise Company, Inc. v. Jackson*, — S.W.2d — (Tenn. 1987), released for publication at Nashville on the 17th day of August, 1987.

In the latter case a plane was purchased by the taxpayer in the State of Delaware for use in corporate business travel. It was delivered to a representative of the taxpayer in New Hampshire and then brought to Tennessee where it was hangered at Nashville. Routine maintenance was performed in Nashville, and the pilots were also based there. Flights generally began or ended in Nashville, but only a very small percentage of the flights were intrastate. No use tax or sales tax had been paid on the equipment to any other state.

In our opinion the Commissioner of Revenue correctly determined that appellee was liable for the Tennessee use tax under the facts shown in this case. It does appear, however, that after the suit was filed a determination was made that appellee had paid a use tax to the State of Louisiana on one of the smaller ancillary vessels. It is agreed by appellant that appellee is entitled to a credit

for the amount of this tax, plus any attributable interest and penalty.

Other than for this adjustment, in our opinion the Chancellor erred in sustaining the claim for refund. The action is dismissed at the cost of appellee, with the exception of the adjustment admittedly due to appellee for previously paid use tax. The cause will be remanded to the trial court for determination of that amount and for any other proceedings which may be necessary.

/s/ William J. Harbison, J.

Brock, C.J., Cooper and Drowota, JJ.,
and Matherne, Sp. J., concur.

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IN THE SUPREME COURT OF TENNESSEE
WESTERN GRAND DIVISION
AT JACKSON

BEAN DREDGING)	
CORPORATION,)	
)	
Plaintiff/Appellee,)	
)	
v.	)	SHELBY
	)	EQUITY NO. 1
MARTHA B. OLSEN,)	
Commissioner of Revenue)	
of the State of Tennessee,)	
)	
Defendant/Appellant.)	

DIRECT APPEAL AS OF RIGHT FROM THE
CHANCERY COURT OF SHELBY COUNTY,
TENNESSEE, PART III, NO. 90712-3

BRIEF ON BEHALF OF APPELLEE
BEAN DREDGING CORPORATION

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ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED FOR REVIEW

Appellee Bean Dredging Corporation respectfully submits that the issues involved in this appeal are as follows:

1. Is the Chancellor's finding that Appellee is engaged in interstate commerce, so as to trigger the applicability of Tenn. Code Ann. § 67-6-321, supported by the evidence in the Record?

2. Does the intermitten docking of the dredge *Lenel Bean* in a navigable waterway during periods of high water, while at all times maintaining its readiness to respond to (sic, order) orders of the Corps of Engineers, as required by contract, amount to a "storage for use or consumption in this state" which is subject to the Tennessee use tax in spite of the applicability of Tenn. Code. Ann. § 67-6-321?

STATEMENT OF THE CASE

This case involves the application of Tenn. Code Ann. § 67-6-321 to the activities of Appellee Bean Dredging Corporation (referred to hereinafter as "Appellee" or "Bean") under three contracts with the United States Corps of Engineers which required Appellee to perform dredging operations on the Mississippi River between Miles 599 and 800, necessitating the movement of Appellee's vessel in and out of the States of Tennessee, Arkansas, Mississippi and Louisiana. Stipulation of Facts, ¶¶ 6-7. Tenn. Code Ann. § 67-6-321 exempts from the Tennessee use tax vessels or barges of fifty (50) tons or over of displacement which are used in interstate commerce.

This case does not, as the Commissioner contends, focus on the "power" of Tennessee to tax these vessels, but turns instead upon the application of an exemption statute which covers Appellee's activities. It is not necessary to determine whether the State has the "power" to levy the tax because the activities involved are specifically exempted from taxation.

The period at issue extends from January 1, 1980 to December 31, 1982. The agents of the Commissioner originally gave notice of an assessment for that period in the amount of \$733,059.00. Stipulation of Facts, ¶¶ 2-3. The assessment was subsequently revised, and on August 18, 1983, Appellee paid the revised assessment, which totaled \$571,552.43, consisting of \$400,037.41 in taxes, \$71,505.67 in interest, and \$100,009.35 in penalty. Stipulation of Facts, ¶¶ 4-5. The payment was made involuntarily and under protest. The parties have stipulated that proper

payment under protest was made and that Appellee preserved its rights under the statutes existing at the time. Stipulation of Facts, ¶ 5.

A suit for refund was filed on December 14, 1983 and a trial was held on May 6, 1986 in Part III of the Chancery Court of Shelby County before the Honorable Chancellor D. J. Alissandratos. At the conclusion of the trial an opinion was rendered in favor of Appellee and a Final Order was entered in accordance with that opinion on May 21, 1986, ordering a refund of all amounts paid under protest. The Final Order, which incorporates the opinion, is attached hereto as Appendix "I."

A Notice of Appeal was filed on June 16, 1986 by the Commissioner of Revenue and the record was filed with this Court on September 24, 1986.

STATEMENT OF THE FACTS

Appellee Bean Dredging Corporation is a corporation organized under the laws of the State of Louisiana. Stipulation, ¶ 1. Bean engages principally in dredging operations on various navigable waterways. Various types of dredging vessels are employed by Bean in the course of its work. Bean's services are most often required during low water level periods. (Tr. p. 29) During high water level periods it is often necessary to dock the dredging vessels. Complaint, ¶ 4 and Answer, ¶ 4 (R. pp. 3 and 20). However, the vessels have never been dry-docked or "mothballed" in Tennessee. (Tr. pp. 45-46)

The United States Army Corps of Engineers engaged Appellee's dredge, the vessel *Lenel Bean*, during the years

1980, 1981 and 1982 to perform dredging operations wherever needed on the Mississippi River between river mile 599 and river mile 800. Stipulation, ¶ 6. Mile marker 599 (located south of the Tennessee state line at the mouth of the White River in Arkansas) marks the southern boundary of the Memphis District of the Corps of Engineers, and mile marker 800 (located in the vicinity of Kate Aubrey, which is just upstream from Osceola, Arkansas) marks the northern boundary of Appellee's services to the Corps of Engineers. (Deposition of Charles K. Davis, pp. 20-21) In order to carry out its contractual obligations, therefore, it was necessary for Bean to move back and forth across several state lines.

In addition, while Bean was engaged in dredging operations, two to three shore stations were set up on either bank of the Mississippi River. At these shore stations on each side of the river, a "Motorola mini-ranger positioning system," which is a radio guidance system, constantly sent signals to the dredge and the computer aboard the dredge to maintain proper position in the river during operations. (Tr. pp. 32-34) Since these stations were necessarily in separate states on most occasions, Bean was constantly engaged in interstate radio transmission during the course of its dredging activities and as a necessary part thereof. (Tr. pp. 32-34)

The following pertinent facts concerning Bean's contracts with the Corps of Engineers are established by the Stipulation of Facts, which incorporates the actual contract documents as Exhibits "E," "F" and "G." Because those contracts are lengthy, however, references to additional portions of the record which support the factual statements have been included where appropriate.

Bean's contracts with the Corps of Engineers require it to furnish the vessel *Lenel Bean* and its attendant plant to perform dredging operations for the Corps of Engineers on the Mississippi River between mile 599 and mile 800. Specific locations are assigned by the Corps of Engineers from time to time (Davis Depo. p. 7), and the contract requires Bean to be available at any assigned location within five days of notice from the Corps of Engineers. (Tr. pp. 42, 44) The contract provides that the Corps of Engineers shall designate the precise area of the river to be dredged, as well as the precise disposal area, and the Corps of Engineers performs surveys to determine the quantity of material transported. (Tr. pp. 29, 30; Stipulation, Exs. "E," "F" and "G") The contracts require Bean to furnish the Corps of Engineers' inspector transportation from all points on shore designated by the Corps of Engineers to and from Bean's vessel and requires Bean to transport on board the *Lenel Bean* Corps of Engineers personnel and equipment and to furnish meals and accommodations to such Corps of Engineers personnel. (Tr. pp. 30 and 31; pp. 50 and 51) Accordingly, in addition to transporting silt and shoal material, Appellee's vessel also transports Corps of Engineers personnel and equipment. (*Id.*) Under the terms of the contract, the quantity of material to be transported cannot be given in advance, but is determined by the shoaling which may occur over an extended time. (See e.g., Stipulation, Ex. "E," p. 2A-1) The order of work to be done cannot be determined except as the work progresses. (See e.g., Stipulation, Ex. "E," p. 2A-1) Succeeding dredging location assignments may be upstream or downstream and may not be at consecutive locations. (See e.g., Stipulation, Ex. "E," p. 2A-2) Upon

completion of work at any given location, Appellee must immediately proceed to and initiate dredging at the next assigned location. Upon receipt of notice of a new assignment, Appellee must remobilize at the assigned location within five days after receipt of the notice. (*Id.*, See also Tr. pp. 42, 44 and Davis Depo., p. 25)

The Corps of Engineers contracts further provide that the material excavated shall be transported and deposited in the disposal areas designated by the Corps of Engineers. (See e.g., Stipulation, Ex. "A," p. 2A-3) The Corps of Engineers requires Bean to keep on the job the dredge, including all necessary attendant plant, needed to meet the requirements of maintaining authorized navigation channels. (*Id.* at 2A-1)

Dredging services are required most often during low water level periods and due to the seasonal nature of the Mississippi River water stages (Davis Depo., p. 18), it is often necessary for the *Lenel Bean* to be anchored during the high water season. In order to retain the ability to respond to any needed point on the Mississippi River between mile ~~350~~ and mile 800 within five days, the *Lenel Bean* customarily anchored at McKellar Lake, a navigable harbor on the Mississippi River system. (Tr. p. 42) While in harbor, necessary servicing was performed to maintain the *Lenel Bean* in a state of readiness. (Tr. pp. 40, 43-44) Necessary lights were maintained, necessary crew and watchman were on board, lines and safety checks were tested, engines and equipment were maintained in a state of readiness, vessel documents and licenses were maintained, and the *Lenel Bean* was available to respond as needed in compliance with the Corps of Engineers' re-

quirements. (Stipulation, Ex. "H," Daily Production Reports) While at anchor at McKellar Lake the *Lenel Bean*'s generator runs at all times. (Tr. p. 44)

In view of the Commissioner's argument that the vessel was in "storage" when anchoring at McKellar Lake, Bean contends that it is important to contrast the state of readiness maintained by the *Lenel Bean* during periods of high water with a vessel being placed in dry dock, shut down, decommissioned, mothballed, stored or otherwise taken out of a condition of operational readiness.

The vessel *Lenel Bean* is a self-propelled, dustpan dredge. (Davis Depo., p. 8) The *Lenel Bean* has all necessary propulsion, steering, navigational and safety equipment for independent navigation. (Tr. pp. 14-15) Pumps on the *Lenel Bean* create a suction, and a pan on the front of the vessel sucks material up through the pan into a pipeline, through which material is transported out to the spoil or discharge area. (Davis Depo., p. 8) The *Lenel Bean* has 1,385 tons displacement, and is registered with the Coast Guard. (Tr. p. 14)

As an integral part of the *Lenel Bean*'s dredging function, the *Lenel Bean*'s attendant plant handles anchors, barges and pipeline for the *Lenel Bean*, carries supplies and personnel, runs hydrographic surveys to locate and monitor shoal before, during and after the dredging process, supports the pipeline and transports silt material to the discharge area. (Stipulation, ¶ 8 and Tr. pp. 14-19) The attendant plant is essential for the *Lenel Bean* to function. (Tr. pp. 18-19)

The Chancellor found, as a matter of fact, that Bean is engaged in interstate commerce and that its entire

activity was for the furtherance and preservation of the navigation of the entire waterways. (Ruling of the Court, p. 2) The State concedes, as it must, that the Mississippi River is clearly an artery of interstate commerce and that Bean's dredging contributes to the navigability of the river. (Appellant's Brief, p. 9) The activities of the *Lenel Bean* in waters adjacent to the State of Tennessee were confined solely to the dredging operations in the Mississippi River conducted pursuant to contract with the U.S. Army Corps of Engineers, which required the *Lenel Bean* to be available to work at any point on the Mississippi River between river mile 599 and river mile 800. (Davis Depo., p. 14; Tr. p. 46 and Stipulation, Ex. "E," "F," "G" and "H") These dredging activities were for maintenance of the Mississippi River shipping channel. No construction activities, such as excavating a new harbor or canal, were engaged in by the *Lenel Bean* in the State of Tennessee. (Tr. pp. 41-42) As a dustpan dredge, the *Lenel Bean* is specifically designed for channel maintenance, as opposed to a cutter head dredge which is stationary and may be used on excavation projects. (Tr. p. 22) In addition to the activities pursuant to the Corps of Engineers contract in the waters adjacent to the States of Mississippi, Arkansas and Tennessee, the *Lenel Bean* did maintenance work in Louisiana and Alabama during 1980-82. (Tr. p. 41) During the actual dredging process it was not unusual for the dredging area to be in one state while the discharge area was in another. (Tr. p. 39)

ARGUMENT

I. A VESSEL OF 50 TONS DISPLACEMENT IS EXEMPT FROM TENNESSEE SALES AND USE TAX EVEN THOUGH SUCH VESSEL HAS COME TO REST WITHIN THE TERRITORY OF TENNESSEE AND HAS BECOME A PART OF THE MASS OF PROPERTY USED HERE.

A. *The Activities of the Vessel Are Exempt From Use Taxation Pursuant to Tenn. Code Ann. § 67-6-321.*

The 1973 Tennessee General Assembly enacted a specific exemption from the sales and use tax for vessels or barges of 50 tons or over of displacement used in interstate commerce. (Tenn. Code Ann. § 67-6-321, formerly codified as Tenn. Code Ann § 67-3012) In view of the proof at trial, the Commissioner has not taken the position that the *Lenel Bean* and its attendant plant are not encompassed within the term "vessel" as used in the statute, but instead asserts the State's right to impose a use tax against the *Lenel Bean* based upon the erroneous argument that the vessel is not used in interstate commerce, or that the anchoring of the *Lenel Bean* in a Mississippi River harbor adjacent to Tennessee during periods of high water removed the *Lenel Bean* from the statutory exemption. The Commissioner's rationale is not supported by reason or by the law. It is certainly not supported by the Chancellor's factual finding, and that finding comes to this Court accompanied by a presumption of correctness. T.R.C.P. 13(d)

B. *T. L. Herbert & Sons, Inc. v. Woods Supports The Application of the Exemption in this Case.*

The only Tennessee decision to interpret this statutory exemption is this Court's decision in the case of *T. L. Her-*

bert & Sons, Inc. v. Woods, 539 S.W.2d 28 (Tenn. 1976). *Herbert* concerned a towboat that was purchased in Louisiana and brought to Tennessee to be used in the Nashville harbor. In reviewing the facts of that case, this Court specifically noted that:

The motor vessel Martha Ann itself seldom ventures outside the territorial waters of the State of Tennessee. . . . The vessel was brought to Tennessee shortly after its purchase, and has been used in and around the Nashville harbor almost exclusively since that time. There is no question but that it has 'come to rest' within the territory of Tennessee, and has become a part of the 'mass of property' used here.

539 S.W.2d at 29.

In *Herbert* this Court found that although the state had the constitutional power to tax the vessel, the vessel was nevertheless within the statutory exemption from taxation. Consequently, it is clear that a vessel can come to rest, and become a part of the mass of the property of Tennessee so as to be subject to the *power* of state taxation, and yet at the same time the same vessel can be in use in interstate commerce within the meaning of the statutory exemption. Thus, even assuming the Commissioner has the *power* to tax the *Lenel Bean*, the legislature specifically exempted vessels such as the *Lenel Bean* from the tax.

Appellee contends that in *Herbert*, the only reported case construing the statutory exemption, this Court has adopted a reading of the statute far broader than the Commissioner's narrow construction.

II. THE TENNESSEE LEGISLATURE HAS ELECTED TO EXEMPT FROM TAXATION VARIOUS "STORAGE" ACTIVITIES, EVEN THOUGH THE U.S. CONSTITUTION WOULD NOT PROHIBIT A TENNESSEE SALES OR USE TAX ON SUCH "STORAGE."

A. *Even if the Temporary Docking of the Vessel is Held to Constitute Storage, It is Not Subject to Imposition of the Use Tax.*

The Commissioner argues that the anchoring of the *Lenel Bean* from time to time at McKellar Lake constitutes "storage" which is subject to the use tax. Reason tells us that no vessel is in perpetual motion. The vessel in *Herbert* was obviously stopped on frequent occasions to dock, to anchor, to tie up, and while awaiting assignment. Applying the Commissioner's rationale, the instant any vessel docked or tied up, such vessel would be considered to be in "storage" and subject to the use tax. However, the Commissioner again very narrowly applies the word "storage" to subject a vessel to use tax. Actually, wherever the term "storage" appears in the Tennessee statute, it is only part of the more precise and limited phrase "storage for use or consumption in this state." See Tenn. Code Ann. §§ 67-6-102(16); 67-6-201; 67-6-203; 67-6-210; 67-6-211.

This Court has repeatedly recognized that the Tennessee legislature has exempted from the use tax property which a taxpayer has in "storage" in Tennessee. Included in the Tennessee cases considering "storage" are the cases of *Young Sales Corp. v. Benson*, 224 Tenn. 88, 450 S.W.2d 574 (1970), and *Beecham Laboratories v. Woods*, 569 S.W.2d 456 (Tenn. 1978). Both of these cases were

decided adversely to the Commissioner, holding that even though storage is encompassed within the definition of "use," the Tennessee legislature has exempted items which are stored in Tennessee for use outside the state. In addition, the incident of taxation, even as to such stored items ultimately used in Tennessee, does not occur until the item is withdrawn from storage and used in Tennessee.

As applied to Bean, even if anchoring the vessel in a harbor constitutes "storage," it does not subject the vessel to Tennessee use tax since the storage was not "storage for use or consumption in the State." The operations of the *Lenel Bean* have been confined strictly to interstate activities, there have been no intrastate or local dredging activities, and the anchoring was in preparation for use in interstate commerce as directed by the Corps of Engineers.

B. *Tennessee Cases Dealing With Taxation of Repairs Performed in Tennessee Do Not Support the Imposition of a Tax in the Instant Case.*

It is noteworthy that even in the service and repair cases cited by Appellant in which Tennessee taxation has been sustained, *only the repairs themselves* were taxed. The underlying property undergoing repair [barges in *Serodino, Inc. v. Woods*, 568 S.W.2d 610 (Tenn. 1978), and motors in *LeTourneau Sales & Service, Inc. v. Olsen*, 691 S.W.2d 531 (Tenn. 1985)] was not subjected to tax. The barges and motors were much more out of service and placed in "storage" in Tennessee than is the *Lenel Bean*, yet no suggestion is made that the *Serodino* barges or *LeTourneau* motors are to be taxed. Only the *repairs* are taxed.

The clear legislative intent to exempt vessels and barges from Tennessee sales and use tax is further indicated by the adoption of the exemption of repair services on vessels and barges [Tenn. Code Ann. § 67-6-327; formerly § 67-3012(8)(b)] almost immediately following the decision in *Serodino*. (1982 [Adj. S.] ch. 576)

III. THE TERM "INTERSTATE COMMERCE" IS A BROAD TERM, EMBRACING EACH OF THE ACTIVITIES OF THE VESSEL IN THIS CASE.

A. *The Activities of the Vessel Fall Within the Court's Definition of Interstate Commerce as Articulated in T. L. Herbert & Sons v. Woods.*

The Tennessee Retailers' Sales Tax Act contains no statutory definition of the term "interstate commerce." Accordingly, in *Herbert*, this Court applied the "generally accepted and defined" meaning of the term "interstate commerce," determining that if the vessel is not engaged in moving *intrastate or local* cargos, although the vessel itself seldom leaves the territorial borders of the state, the vessel is nevertheless in interstate commerce as that term is generally accepted and defined. 539 S.W.2d at 30.

The extraterritorial activities of the *Lenel Bean* are far greater than the out-of-state activities of the *Herbert* vessel. The *Lenel Bean* frequently leaves the waters of the State of Tennessee, traveling through waters of Arkansas, Mississippi and Louisiana, whereas the *Herbert* vessel seldom left the waters of the State of Tennessee. The *Lenel Bean* is in the Mississippi River, bordering the State of Tennessee, whereas the *Herbert* vessel was on the Cumberland River, surrounded by the State of Tennessee. The owner of the *Lenel Bean* is a Louisiana corporation, headquartered in Louisiana, whereas the owner of the *Herbert*

vessel was a Tennessee corporation, headquartered in Tennessee. The *Lenel Bean* is anchored in waters bordering the State of Tennessee only during periods of high water and in order to be in a state of readiness to respond to points on the Mississippi River as directed by the Corps of Engineers. The *Herbert* vessel was actually a harbor boat operating almost exclusively in the Nashville harbor. 539 S.W.2d at 29.

In *Herbert*, this Court made approving reference to the exemption for vehicles used for "movement in interstate commerce," as applied in *United Parcel Service, Inc. v. Arnold*, 211 Kan. 102, 542 P.2d 694 (1975). 539 S.W.2d at 31, n. 2. In *United Parcel Service*, the Supreme Court of Kansas recognized that a carrier, although operating a line wholly within a state, is nevertheless engaged in interstate commerce when the carrier is itself transporting other property or persons which have crossed or will cross state boundaries. The *United Parcel Service* case involved vans and tractor trailers which were used solely within the State of Kansas to transport parcels traveling in interstate commerce. When brought into the State of Kansas, the transportation units were ready for immediate use in the same form, and were not held back from the normal course of operations. Similarly, even though temporarily at anchor during high water, the *Lenel Bean* was ready for immediate use in the same form and was not held back from the normal course of operations. Clearly, the normal course of operation of a dredge used in maintaining a navigational channel is that the dredge is actually dredging only when the water is shallow, not during flood stage. It is entirely "normal operation" for a dredge to be anchored during high water, but remaining

in a state of readiness to respond when needed. In view of the facts of this particular case, where the *Lenel Bean* is required by contract to remain in a state of readiness in order to respond to orders of the Corps of Engineers within five days, and in view of the fact that the sole function of the vessel is to dredge during low water periods, which are determined by the weather and are not within Beans' control, "normal operation" requires standing by in a central location such as McKellar Lake.

B. Case Law From Other States and in the Federal Courts Supports a Finding that Dredging on an Interstate Waterway Constitutes Interstate Commerce.

Case law supports the Chancellor's factual finding that Bean was engaged in interstate commerce in this case. Appellant incorrectly asserts in its Brief that all jurisdictions considering the issue have found dredging not to constitute interstate commerce. (Appellant's Brief, p. 13) In fact, numerous cases have specifically held that dredging, dike revetment and similar activities on navigable rivers constitute engaging in interstate commerce. The case of *Walling v. Patton-Tulley Transportation Co.*, 134 F.2d 945 (6th Cir. 1943), involved employees engaged on dike and revetment construction on the Mississippi River under contracts of their employer with the United States. The court there noted that "the Mississippi River has been a highway of interstate commerce since states were first carved out of its contributory territory We have no difficulty in concluding that the dike and revetment employees of the appellee were engaged in interstate commerce" 134 F.2d at 947. Cases specifically holding dredging to be included in interstate commerce in-

clude *Ritch v. Puget Sound Bridge and Dredging Co., Inc.*, 156 F.2d 334 (9th Cir. 1946); *Walling v. Sternberg Dredging Co.*, 64 F. Supp. 758 (E.D. Mo. 1946), *aff'd* 158 F.2d 678 (8th Cir. 1946); and *Cuascut v. Standard Dredging Corp.*, 94 F. Supp. 197 (D.P.R. 1950).

In the recent case of *Port of Portland v. Water Quality Insurance Syndicate*, 796 F.2d 1188 (9th Cir. 1986), the Court of Appeals for the Ninth Circuit was called upon to determine whether a dredge, which sank while being prepared for another dredging season on the Columbia and Willamette Rivers under a contract with the Corps of Engineers, was "engaged in commerce" so as to fall within the coverage of its insurance policy. The Court held that dredging activities did constitute commerce, citing with approval the case of *Ritch v. Puget Sound Bridge & Dredging Co.*, *supra*. The Ninth Circuit held that the dredge was engaged in commerce even though the dredge was merely preparing for its dredging activities. In so doing, the Court noted that the concept of interstate commerce has been extended by the recent United States Supreme Court case of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 1016-21, 83 L. Ed. 2d 1016 (1985) which overruled *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976) and held that the commerce clause extends to all intrastate economic activities affecting interstate commerce. Bean respectfully submits that the analysis in *Port of Portland* is in keeping with the modern concept of interstate commerce.

Several decisions have further held that repairmen and watchmen of vessels temporarily removed from service are engaged in interstate commerce. Repairmen and

watchmen on vessels temporarily removed from service while being repaired continue to be engaged in interstate commerce, since the vessels retain their status as instrumentalities of interstate commerce during such times of being temporarily out of service. *Craig v. Heide & Co.*, 94 F. Supp. 442 (E.D.N.C. 1951); *Slover v. Walthen*, 140 F.2d 258 (4th Cir. 1944); *Walling v. Keansburg Steamboat Co.*, 162 F.2d 405 (3d Cir. 1947); and *Divins v. Hazeltine Electronics Corp.*, 163 F.2d 100 (2d Cir. 1947). Since the *Lenel Bean* remained an instrumentality of interstate commerce while anchoring during high water and since its crew continued to be engaged in interstate commerce, the *Lenel Bean* itself remained exempt from the sales and use tax.

As noted above, Appellant erroneously states that all jurisdictions which have addressed the question of whether dredging constitutes an activity in interstate commerce have ruled in favor of the state tax liabilities. Actually, the Commissioner cites only one case addressing the issue in light of an exemption similar to Tennessee's exemption statute, Tenn. Code Ann. § 67-6-321. That one case was the New York case of *Great Lakes Dredge & Dock Co. v. Dep't of Taxation*, 39 N.Y.2d 75, 346 N.E.2d 796 (1976).

The decision in the New York case, however, involved an exemption statute which covered only vessels "primarily engaged in interstate or foreign commerce." 346 N.E.2d at 797 (emphasis supplied). More importantly, the decision was reached on the basis of a specific finding as follows:

It was specifically found that the dredges, drill boats and cranes did not move across state lines while engaged in their usual work tasks.

346 N.E.2d at 797.

There, the dredge itself was exclusively in one state, the State of New York. The dredge itself never crossed state lines while engaged in its usual work tasks, and only separate scows were used to haul disposal materials across state lines to dump the loads. The type of dredging process utilized in the New York dredging activity is substantially different from the dredging activity of Bean on the Mississippi River on the border between Tennessee and Arkansas. The facts show that the *Lenel Bean* did, in fact, move across state lines while engaged in its usual work tasks. On occasion, the dredge worked *simultaneously* in Tennessee and Arkansas or Mississippi waters with its dustpan head in one state and its discharge in another. Unlike the facts of the instant case, the dredges in the New York case were fixed in one place by a special anchor.

The cases cited by the Commissioner in its Brief to support its proposition that the dredging activities in the instant case do not constitute interstate commerce are distinguishable. In addition to the factual dissimilarities between Bean and the cases cited, it must be noted that the courts approach the question of interstate commerce in a different manner when dealing with the issue of whether a state has the *power* to tax without an unconstitutional infringement on interstate commerce, as opposed to when they approach an exemption statute which exempts instrumentalities used in interstate commerce from a particular state tax. This Court implicitly recognized that distinction in the *Herbert* case in overruling the trial court's finding in favor of the State, while at the same time observing:

The trial judge concluded that the vessel was not being "used in interstate commerce", so as to fall within the purview of the exemption. His findings, however were based largely upon the discussion of constitutional issues, and upon the taxpayer's contention that the state could not constitutionally levy a tax upon a vessel used as described above. As previously stated, the trial court was clearly correct in holding that the taxing power of the state does attach to such use, and that the state may validly tax some aspects of "interstate commerce."

539 S.W.2d at 29.

Similarly, the cases cited by the Commissioner in support of its proposition are cases examining the question of whether particular states have the power to constitutionally tax dredging activities without running afoul of the Commerce Clause of the Constitution. This is an issue which Bean has conceded. Bean does not contend that the State of Tennessee has no power to tax the activities involved in this case, but does contend that the activities have been exempted by statute.

The Maryland Court of Appeals in *Atlantic, Gulf and Pacific Co. v. State Dep't of Assessments and Taxation*, 249 A.2d 180 (M.D. 1969), specifically considered the issue of whether a dredge was engaged in interstate commerce in a case involving the application of Maryland taxing statutes. Citing numerous federal decisions, the Maryland court held that there is little doubt that the dredge was engaged in interstate commerce.

In the federal decisions, there is little doubt that the *Pittsburgh* was engaged in interstate commerce.

Repair of facilities of interstate commerce is activity 'in commerce' within the meaning of the Act . . . and

we think the work of improving existing facilities of interstate commerce, involved in the present case, falls in the same category.

249 A.2d at 184.

The Maryland court relied upon the Supreme Court's enunciation in *Overstreet v. North Shore Corporation*, 318 U.S. 125, 63 S. Ct. 494, 87 L. Ed. 656 (1943), for the proposition that the improvement or repair of facilities of interstate commerce constitutes interstate commerce.

No state has taxed dredging activities in light of the combination of Tennessee's statutory exemption, the facts in *Bean*, and the ruling of this Court in *Herbert*.

The Commissioner's implication that Tennessee intends to tax everything it could possibly constitutionally tax is patently incorrect. For example, a sale, consummated in Tennessee, of a vessel *could* clearly be subjected to a sales tax in Tennessee without violating the United States Constitution, even though that vessel was intended to be placed in interstate commerce. However, Tenn. Code Ann. § 67-6-321 exempts that sale from the Tennessee sales tax. For the Commissioner to suggest that Tennessee intends to exempt a sale, but tax the use of the same vessel, is faulty and ignores the basic tenet of taxation that a use tax is a *compensating tax*, designed to prevent avoidance of sales taxes and insure that manufacturers and merchants in the state remain on equal competitive footing with nonresidents. If the sale to a Tennessee resident is not to be taxed, the use by a nonresident is likewise not to be taxed.

CONCLUSION

In view of the foregoing points and authorities and in light of the record in the trial court and the findings of the Chancellor, Appellee Bean Dredging Corporation respectfully asserts that the Chancellor correctly determined the issues in this case and the Chancellor's decision should be affirmed.

Respectfully submitted,

/s/ Boyd L. Rhodes, Jr. (by RMG) (7966)

/s/ R. Mark Glover (6807)
Attorneys for Plaintiff/
Appellee Bean Dredging
Corporation

HEISKELL, DONELSON, BEARMAN
ADAMS, WILLIAMS & KIRSCH
6750 Poplar, Suite 308
Memphis, Tennessee 38138
(901) 755-6713

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a true and exact copy of the foregoing instrument by U.S. Mail, postage prepaid, to counsel for the Commissioner of Revenue of the State of Tennessee, the Honorable Charles L. Lewis, Deputy Attorney General, 450 James Robertson Parkway, Nashville, Tennessee, 37219, this 20th day of November, 1986.

RMG15/C3521-01

/s/ R. Mark Glover

APPENDIX I

IN THE CHANCERY COURT FOR
SHELBY COUNTY, TENNESSEE

BEAN DREGING)	
CORPORATION,)	
	)	NO. 90712-3
PETITIONER,)	
)	
v.)	
)	
MARTHA B. OLSEN, and her)	
successors, COMMISSIONER)	
OF REVENUE, STATE OF)	
TENNESSEE,)	
)	
RESPONDENT.)	

FINAL DECREE

This cause came on to be heard before the Honorable D. J. Alissandratos, Chancellor of Part III of the Chancery Court of Shelby County, Tennessee, in open Court, upon the sworn testimony of Capt. Charles K. Davis, upon the sworn testimony of Virginia Adams, Director of Statistics, Department of Revenue; upon the stipulations of fact filed in this cause and made in open Court, upon the respective briefs of the parties herein, and upon statements and arguments of counsel in open Court, and upon the entire record in this cause.

From all of which it appears and the Court finds for the reasons stated in its Memorandum Opinion orally rendered from the bench, a transcript of which is attached hereto and incorporated herein by reference, that Petitioner is entitled to a refund of the taxes, penalty and in-

terest paid under protest in the amount of Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars (\$571,552.43), plus interest thereon at the rate of ten percent (10%) per annum from August 18, 1983, the date of Petitioner's payment under protest.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that Petitioner be and hereby is awarded a judgment in the amount of Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars (\$571,552.43), plus interest thereon at the rate of ten percent (10%) per annum from August 18, 1983, until paid.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the costs of this cause be and the same hereby are assessed against the Respondent, State of Tennessee, Department of Revenue.

/s/ D. J. Alissandratos
D. J. Alissandratos, Chancellor
5-21-86

DATE: _____

APPROVED FOR ENTRY:

/s/ Boyd L. Rhodes, Jr.
BOYD L. RHODES, JR.
Attorney for Petitioner

/s/ Charles L. Lewis
CHARLES L. LEWIS
Deputy Attorney General
Attorney for Respondent

/s/ James Baywell
Deputy Clerk

IN THE CHANCERY COURT OF TENNESSEE
FOR THE TENTH CHANCERY
DIVISION AT MEMPHIS

BEAN DREDGING,

Plaintiff,

Vs.

MARTHA OLSEN,
COMMISSIONER OF REVENUE,

Defendant.

BEFORE: Judge D. J. Alissandratos

Case Number:
90712-3

THE RULING OF THE COURT

May 6, 1986

* * *

THE COURT: I want to compliment the lawyers on very thoroughly briefing this matter and preparing for this hearing. I appreciate not only the thoughtfulness as reflected by those briefs but also the thoughtfulness of your remarks both in closing argument and also in responding to the questions of the Court.

This Court is of the opinion that while it is helpful to have the thoughtful analysis of sister states in their opinions from their courts that this Court must look first to the law as set out by the courts of Tennessee. This Court, therefore, relies heavily upon the Herbert and Sons versus Woods case that has been cited by both parties.

In reviewing the facts of this case and the facts of that case I find that the plaintiffs in this cause were engaged in interstate commerce. I find that the entire scope of their activity was for the furtherance of preserving the navigation of the entire waterways, and I see no distinction between that and one who would avail themselves of those waterways simply for the purpose of transporting either goods or services across them.

With regard to the argument propounded by the Commissioner as relates to storage, this Court does not believe that the statute contemplates the facts as in this case. Again relying on the Herbert case I would point out that indeed in this case the only reason I find that this vessel was not actually docked in Tennessee is because there was no dock suitable enough for it to be docked. It created a man-made dock. For all practical purposes, it was docked. But it was not here in a capacity of storage as within the meaning of the statute I do not believe. It was here temporarily. And while that temporary time may have at times seemed somewhat frequent it was only as a result of the condition of the river the vast majority of the time that caused it to remain in its man-made dock. I see that as no different than the Herbert case.

The primary mission of the plaintiffs in this case and purpose was to conduct interstate activity and its contacts with Tennessee were only for the purpose of furtherance of the activity. Therefore, I will grant judgment in favor of the plaintiffs, cost to be assessed against the defendants.

COURT REPORTER'S CERTIFICATE

STATE OF TENNESSEE:

COUNTY OF SHELBY:

I, LISA M. MCMANNIS, Reporter and Notary Public, Shelby County, Tennessee, CERTIFY:

1. The foregoing hearing was taken before me at the time and place stated in the foregoing styled cause;

2. Being a Court Reporter, I then reported the hearing in Stenotype to the best of my skill and ability, and the foregoing pages contain a full, true and correct transcript of my said Stenotype notes then and there taken;

3. I am not in the employ of and am not related to any of the parties or their counsel, and I have no interest in the matter involved.

WITNESS MY SIGNATURE, this, the 6th of May, 1986.

/s/ Lisa M. McMannis
LISA M. MCMANNIS,
Court Reporter
Notary Public for the State
of Tennessee at Large

My commission expires:
March 18, 1989

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

**BEAN DREDGING
CORPORATION,**

Plaintiff,

V.

MARTHA B. OLSEN,
Commissioner of Revenue.

Defendant.

NO. 90712-3

PLAINTIFF'S REPLY BRIEF

TO THE HON. D. J. ALISSANDRATOS, CHANCELLOR
OF PART THREE OF THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE:

Plaintiff Bean Dredging Corporation respectfully submits this Reply to Defendant's Trial Brief.

DREDGING ACTIVITIES ON NAVIGABLE WATERWAYS CONSTITUTE ACTIVITIES IN INTERSTATE COMMERCE.

The Commissioner erroneously states that all jurisdictions which have addressed the question of whether dredging constitutes an activity in interstate commerce have ruled in favor of the state tax liabilities. Actually, the Commissioner cites only one case addressing the issue in light of an exemption similar to Tennessee's exemption statute, § 67-6-321. That one case was the New York case of *Great Lakes Dredge Co. v. Dep't of Taxation*, cited on page 7 of the Commissioner's Brief.

However, the decision in the New York case was reached on the basis of a specific finding as follows:

It was specifically found that the dredges, drill boats and cranes did not move across state lines while engaged in their usual work tasks.

346 N.E.2d at 797.

There, the dredge itself was exclusively in one state, the State of New York, the dredge itself never crossed state lines while engaged in its usual work tasks, and only separate scows were used to haul disposal materials across state lines to dump the loads. The type dredging process utilized in the New York dredging activity is substantially different from the dredging activity of Bean on the Mississippi River on the border between Tennessee and Arkansas. The facts show that the Lenel Bean did, in fact, move across statelines while engaged in its usual work tasks. On occasion, the dredge worked *simultaneously* in Tennessee and Arkansas or Mississippi waters with its dustpan head in one state and its discharge in another.

In addition, the Maryland court in *Atlantic, Gulf and Pacific Co. v. State Dep't of Assessments and Taxation*, 249 A.2d 180 (M.D. 1969), specifically considered the issues of whether a dredge was engaged in interstate commerce. Citing numerous federal decisions, the Maryland court held that there is little doubt that the dredge was engaged in interstate commerce.

In the federal decisions, there is little doubt that the *Pittsburgh* was engaged in interstate commerce.

Repair of facilities of interstate commerce is activity 'in commerce' within the meaning of the Act . . . and we think the work of improving existing facilities of

interstate commerce, involved in the present case, falls in the same category.

249 A.2d at 184.

The Maryland court relied upon the Supreme Court's enunciation in *Overstreet v. North Shore Corporation*, 318 U.S. 125, 63 S.Ct. 494, 87 L.Ed. 656 (1943), for the proposition that the improvement or repair of facilities of interstate commerce constitutes interstate commerce.

No state has taxed dredging activities in light of the combination of Tennessee's statutory exemption, the facts in *Bean*, and the ruling of the Tennessee Supreme Court in *Herbert* to the effect that a vessel which had come to rest in Tennessee and become a part of the mass of property of Tennessee nevertheless remained in interstate commerce within Tennessee's statutory exemption.

TENNESSEE'S STATUTE SPECIFICALLY EXEMPTS NUMEROUS ACTIVITIES WHICH COULD BE SUBJECTED TO TAX WITHOUT VIOLATING THE U. S. CONSTITUTION.

The Commissioner's implication that Tennessee intends to tax everything it could possibly constitutionally tax is patently incorrect. For example, a sale, consummated in Tennessee, of a vessel *could* clearly be subjected to a sales tax in Tennessee without violating the U.S. Constitution, even though that vessel was intended to be placed in interstate commerce. However, T.C.A. § 67-6-321 exempts that sale from Tennessee tax. For the Commissioner to suggest that Tennessee intends to exempt a sale, but tax a use of the same vessel, is faulty and ignores the basic tenet of taxation that a use tax is a *compensating tax*.

designed to prevent avoidance of sales taxes and insure that manufacturers and merchants in the state remain on equal competitive footing with nonresidents. If the sale to a Tennessee resident is not to be taxed, the use by a nonresident is likewise not to be taxed.

THE TENNESSEE LEGISLATURE HAS ELECTED TO EXEMPT FROM TAXATION VARIOUS "STORAGE" ACTIVITIES, EVEN THOUGH THE U.S. CONSTITUTION WOULD NOT PROHIBIT A TENNESSEE SALES OR USE TAX ON SUCH "STORAGE."

nized that the Tennessee legislature has exempt from the use tax property which a taxpayer has in "storage" in Tennessee. Included in the Tennessee cases considering "storage" are the cases of *Young Sales Corp. v. Benson*, 224 Tenn. 88, 450 S.W.2d 574 (1970), and *Beecham Laboratories v. Woods*, 569 S.W.2d 456 (Tenn. 1978). Both of these cases were decided adversely to the Commissioner, holding that even though storage is encompassed within the definition of "use," the Tennessee legislature has exempted items which are stored in Tennessee for use outside the state. In addition, the incident of taxation, even as to such stored items ultimately used in Tennessee, does not occur until the item is withdrawn from storage and used in Tennessee.

As applied to Bean, even if anchoring the vessel in harbor constitutes "storage," such storage was not for use or consumption in Tennessee. The anchoring was for use in interstate commerce as directed by the Corps of Engineers.

The Tennessee Supreme Court has repeatedly recog-

It is noteworthy that even in the service and repair cases in which Tennessee taxation has been sustained, *only the repairs themselves* were taxed. The underlying property undergoing repair (barges in *Serodino* and motors in *LeTourneau*) was not subjected to tax. The barges and motors were much more out of service and placed in "storage" in Tennessee than is the *Lenel Bean*, yet no suggestion is made that the *Serodino* barges or *LeTourneau* motors are to be taxed. Only the *repairs* are taxed.

The clear legislative intent to exempt vessels and barges from Tennessee sales and use tax is further indicated by the adoption of the exemption of repair services on vessels and barges (T.C.A. § 67-6-327) almost immediately following the court decision in *Serodino*.

SUMMARY

Tennessee cases are more pertinent to a Tennessee tax decision than are cases from other jurisdictions. The Tennessee Supreme Court in *Herbert*, *Beecham Laboratories* and *Young Sales* has repeatedly emphasized that the term "interstate commerce" exempts a range of activities which *could* be subjected to a constitutional tax, and that the exemption is not limited to the limits of a constitutional tax on use.

Respectfully submitted,

BOYD L. RHODES, JR. (7966)
Attorney for Plaintiff

OF COUNSEL:

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(901) 755-6713

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument has been served on opposing counsel by depositing a copy in the U.S. mail, postage prepaid, this —— day of May, 1986, and by personal delivery to opposing counsel.

BLR7A/E8672-04

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

BEAN DREDGING)	
CORPORATION,)	
)	
Plaintiff,	)	NO. 90712-3
)	
V.)	
)	
MARTHA B. OLSEN,)	
Commissioner of Revenue,)	
)	
Defendant.)	

PLAINTIFF'S PRE-TRIAL BRIEF

TO THE HONORABLE CHANCELLORS OF THE
CHANCERY COURT OF SHELBY COUNTY, TENNESSEE:

Plaintiff Bean Dredging Corporation respectfully submits the following Pre-Trial Brief.

FACTS

Nature of the Case.

This is a suit for refund of Tennessee sales and use taxes paid by Bean Dredging Corporation ("Bean") to the Commissioner of Revenue of the State of Tennessee ("Commissioner"). The Commissioner also assessed penalty and interest, and Bean properly paid under protest the total assessment of tax, penalty and interest.

Jurisdictional and Procedural Requirements.

Jurisdiction and venue are properly in Chancery Court in Shelby County, Tennessee. Jurisdiction, venue

and statutory requirements of payment under protest within the period of limitations are admitted by the Commissioner and are not at issue.

Description of Bean.

Bean is a Louisiana corporation with its principal place of business in Metairie, Louisiana. Bean engages principally in dredging operations on various navigable waterways, transporting silt and shoal material from points within the navigable shipping channel to points outside the channel. The particular silt and shoal material transported by Bean's dredge may originate at any point on the watershed of the Mississippi River system and be carried downstream by the river to form a shoal or sandbar. For example, dirt from an Iowa farm may be washed into the Mississippi River system, commingled with dirt from farms in other states, carried downstream by the current, and deposited on a sandbar in the channel of the Mississippi River, from which it is then transported outside the channel by Bean's dredge.

Services to Corps of Engineers.

The U.S. Army Corps of Engineers engaged Bean's dredge, the vessel *Lenel Bean*, during the years 1980-82 to perform dredging operations wherever needed on the Mississippi River between river mile 599 and river mile 800. Mile marker 599 (located between Bolivar County, Mississippi and Desha County, Arkansas, approximately 10 miles upstream from Rosedale, Mississippi) marks the southern boundary of the Memphis District of the Corps of Engineers, and mile marker 800 (located between Lauderdale County, Tennessee and Mississippi County, Arkansas,

approximately 14 miles upstream from Osceola, Arkansas) marks the northern boundary of Bean's services to the Corps of Engineers.

Corps of Engineers Contract.

Bean's contract with the Corps of Engineers requires Bean to furnish the vessel *Lenel Bean* and its attendant plant to perform dredging operations for the Corps of Engineers on the Mississippi River between mile 599 and mile 800. Specific locations are assigned by the Corps of Engineers from time to time, and the contract requires Bean to be available at any assigned location within five days of notice from the Corps of Engineers. The contract provides that the Corps of Engineers shall designate the precise area of the river to be dredged, as well as the precise disposal area, and the Corps of Engineers performs surveys to determine the quantity of material transported. The contract requires Bean to furnish the Corps of Engineers' inspector transportation from all points on shore designated by the Corps of Engineers to and from Bean's vessel and requires Bean to transport on board the *Lenel Bean* Corps of Engineers personnel and equipment and to furnish the meals and accommodations to such Corps of Engineers personnel. Accordingly, in addition to transporting silt and shoal material, Bean's vessel also transports Corps of Engineers personnel and equipment. Under the terms of the contract, the quantity of material to be transported cannot be given in advance, but is determined by the shoaling which may occur over an extended time. The order of work to be done cannot be determined except as the work progresses. Succeeding dredging location assignments may be upstream or downstream and may

not be at consecutive locations. Upon completion of any given location, Bean must immediately proceed and initiate dredging at the next assigned location. Assignments of dredging locations will be dependent upon river stages and relative shoaling rates and channel conditions. These dredging locations will be determined and assigned by the Corps of Engineers. Upon receipt of notice of a new assignment, Bean must remobilize at the assigned location within five days after receipt of the notice.

The contract further provides that the material excavated shall be transported and deposited in the disposal areas designated by the Corps of Engineers. The Corps of Engineers requires Bean to keep on the job the dredge, including all necessary attendant plant, needed to meet the requirements of maintaining authorized navigation channels, and sufficient length of floating discharge pipeline is required to insure proper placement of dredged material. Dredging services are required most often during low water level periods and due to the seasonal nature of the Mississippi River water stages, it is often necessary for the *Lenel Bean* to be anchored during the high water season. In order to retain the ability to respond to any needed point on the Mississippi River between mile 599 and mile 800 within five days, the *Lenel Bean* customarily anchored adjacent to the Corps of Engineers facility at McKellar Lake, a navigable harbor on the Mississippi River system. While in harbor, necessary servicing was performed to maintain the *Lenel Bean* in a state of readiness. Necessary navigational lights were maintained, necessary crew and watchman were on board, lines and safety checks were tested, engines and equipment were maintained in a

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state of readiness, vessel documents and licenses were maintained, and the *Lenel Bean* was available to respond as needed in compliance with the Corps of Engineers' requirements.

It is important to contrast the state of readiness maintained by the *Lenel Bean* during periods of high water with a vessel being placed in dry dock, shut down, decommissioned, mothballed, stored or otherwise taken out of a condition of operational readiness.

The Vessel Lenel Bean.

The vessel *Lenel Bean* is a self-propelled, dustpan dredge. The *Lenel Bean* has all necessary propulsion, steerage, navigational and safety equipment for independent navigation. Pumps on the *Lenel Bean* create a suction, similar to a vacuum cleaner, and a pan on the front of the vessel sucks material up through the pan into a pipeline, through which material is transported out to the spoil or discharge area. The *Lenel Bean* has 1,385 tons displacement, it is 245 feet long, 40 feet wide, and has Coast Guard Registration No. 297573.

As an integral part of the *Lenel Bean's* dredging function, the *Lenel Bean's* attendant plant includes: (a) the *Richelle*, a self-propelled hydraulic crane barge of 134 tons displacement, 58 feet long, 30 feet wide, and having Coast Guard Registration No. 612597 and operated for the handling of anchors and pipeline for the *Lenel Bean*; (b) the tender *Robyn*, a push boat of 33.25 tons displacement, 38 feet long, 16 feet wide, and having Coast Guard Registration No. 603063 which handles barges and pipeline for the *Lenel Bean* and carries supplies and personnel; (c) the

Recon IV, a survey vessel on which Louisiana sales taxes have previously been paid in the amount of \$1,265.60 which runs hydrographic surveys to locate and monitor shoal before, during and after the dredging process; (d) Barges No. 1601-1620, which are a matched set of pontoon barges which support the pipeline and transport silt material to the discharge area; and (e) the three-drum hoist, a component of Derrick Barge No. 31, which consists of a cable hoist mechanism and serves as a backup to the *Richelle*.

Interstate Activities.

The activities of the *Lenel Bean* in waters adjacent to the State of Tennessee were confined solely to the dredging operations conducted pursuant to the contract with the U.S. Army Corps of Engineers, which required the *Lenel Bean* to be available to work at any point on the Mississippi River between river mile 599 and river mile 800. These dredging activities were for maintenance of the Mississippi River shipping channel. No construction activities, such as excavating a new harbor or canal, were engaged in by the *Lenel Bean* in the State of Tennessee. As a dustpan dredge, the *Lenel Bean* is specifically designed for channel maintenance, as opposed to a cutter head dredge which may be used on excavation projects. In addition to the activities pursuant to the Corps of Engineers contract in the waters adjacent to the States of Mississippi, Arkansas and Tennessee, the *Lenel Bean* did maintenance work on the Calcasieu River in Louisiana during 1980 and was involved with the Theodore Ship Channel project outside Mobile, Alabama during 1980-81. The *Lenel Bean* has never engaged in transporting intrastate or local Tennessee cargo.

ISSUE

IS THE *LENEL BEAN* A VESSEL OR BARGE OF 50 TONS OR OVER OF DISPLACEMENT PURCHASED FOR USE IN INTERSTATE COMMERCE OR BEING USED IN INTERSTATE COMMERCE, AND EXEMPT FROM SALES AND USE TAX AS PROVIDED IN T.C.A. § 67-6-321?

STATEMENT OF LAW

A VESSEL OF 50 TONS DISPLACEMENT IS EXEMPT FROM TENNESSEE SALES AND USE TAX EVEN THOUGH SUCH VESSEL HAS COME TO REST WITHIN THE TERRITORY OF TENNESSEE AND HAS BECOME A PART OF THE MASS OF PROPERTY USED HERE.

The 1973 Tennessee General Assembly enacted a specific exemption from the sales and use taxes for vessels or barges of 50 tons or over of displacement used in interstate commerce. (T.C.A. § 67-6-321, formerly codified as T.C.A. § 67-3012.) In view of the specific statutory exemption, the only rational basis for the Commissioner to assert a sales and use tax against the *Lenel Bean* is the erroneous position that anchoring the *Lenel Bean* in a Mississippi River harbor adjacent to Tennessee during periods of high water removed the *Lenel Bean* from the statutory exemption. The Commissioner's rationale is not supported by reason or by the law.

The only Tennessee decision to interpret this statutory exemption is *T. L. Herbert and Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976). *Herbert* concerned a tow-

boat that was purchased in Louisiana and brought to Tennessee to be used in the Nashville harbor. The court specifically noted that:

The motor vessel Martha Ann itself seldom ventures outside the territorial waters of the State of Tennessee. . . . The vessel was brought to Tennessee shortly after its purchase, and has been used in and around the Nashville harbor almost exclusively since that time.—There is no question but that it has ‘come to rest’ within the territory of Tennessee, and has become a part of the ‘mass of property’ used here.

In *Herbert* the Tennessee Supreme Court found that although the state had the *constitutional power* to tax the vessel, the vessel was nevertheless within the statutory exemption from taxation. Consequently, it is clear that a vessel can come to rest and become a part of the mass of the property of Tennessee so as to be subject to the *power* of state taxation, and yet at the same time the same vessel can be considered as being used in interstate commerce within the meaning of the statutory exemption. Thus, even assuming the Commissioner has the *power* to tax the *Lenel-Bean*, the legislature specifically exempted vessels from the tax.

Herbert, the only reported case construing the statutory exemption, has adopted a reasoning far broader than the Commissioner’s very narrow and unrealistic construction.

Reason tells us that no vessel is in perpetual motion. The vessel in *Herbert* was obviously stopped on frequent occasions to dock, to anchor, to tie up, and while awaiting assignment. Applying the Commissioner’s rationale, the instant any vessel docked or tied up, such vessel would be considered to be in “storage” and subject to the use tax.

However, the Commissioner again very narrowly applies the word "storage" to subject a vessel to use tax. Actually, wherever the term "storage" appears in the Tennessee statute, it is only part of the more precise and limited phrase "storage for use or consumption in this state." See T.C.A. §§ 67-102(16); 67-6-201; 67-6-203; 67-6-210; 67-6-211. Accordingly, even if docking or anchoring a vessel during a period of high water constitutes "storage," such does not subject the vessel to Tennessee use tax since the storage is *not* "storage for use or consumption in Tennessee." The operations of the *Lenel Bean* have been confined strictly to interstate activities, and there have been no intrastate or local dredging activities.

THE TERM "INTERSTATE COMMERCE" IS A BROAD TERM, EMBRACING EACH OF THE ACTIVITIES OF THE *LENEL BEAN*.

The Tennessee Retailers' Sales Tax Act contains no statutory definition of the term "interstate commerce." Accordingly, in *Herbert*, the Tennessee Supreme Court applied the "generally accepted and defined" meaning of the term "interstate commerce," determining that if the vessel is not engaged in moving *intrastate or local* cargos, although the vessel itself seldom leaves the territorial borders of the state, the vessel is nevertheless in interstate commerce as that term is generally accepted and defined.

The extraterritorial activities of the *Lenel Bean* are far greater than the out-of-state activities of the *Herbert* vessel. The *Lenel Bean* frequently leaves the waters of the State of Tennessee, traveling through waters of Arkansas, Mississippi and Louisiana, where as the *Herbert*

vessel seldom left the waters of the State of Tennessee. The *Lenel Bean* is in the Mississippi River, bordering the State of Tennessee, whereas the *Herbert* vessel was on the Cumberland River, surrounded by the State of Tennessee. The owner of the *Lenel Bean* is a Louisiana corporation, headquartered in Louisiana, whereas the owner of the *Herbert* vessel was a Tennessee corporation, headquartered in Tennessee. The *Lenel Bean* is anchored in waters bordering the State of Tennessee only during periods of high water and in order to be in a state of readiness to respond to points on the Mississippi River as directed by the Corps of Engineers. The *Herbert* vessel was actually a harbor boat operating almost exclusively in the Nashville harbor.

It is also instructive to note that the Tennessee Supreme Court in *Herbert* approved the exemption for vehicle used for "movement in interstate commerce," as applied in *United Parcel Service, Inc. v. Arnold*, 211 Kan. 102, 542 P.2d 694 (1975). In *United Parcel Service*, the court recognized that a carrier, although operating a line wholly within a state, is nevertheless engaged in interstate commerce where the carrier is itself transporting other property or persons which has crossed or will cross state boundaries. The *United Parcel Service* case involved vans and tractor trailers which were used solely within the State of Kansas to transport parcels traveling in interstate commerce. When brought into the State of Kansas, the transportation units were ready for immediate use in the same form, and were not held back from the normal course of operations. Similarly, even though temporarily at anchor during high water, the *Lenel Bean* was ready for immediate use in the same form and was not

held back from the normal course of operations. Clearly, the normal course of operation of a dredge used in maintaining a navigational channel is that the dredge is actually dredging only when the water is shallow, not during flood stage. It is entirely "normal operation" for a dredge to be anchored during high water, but remaining in a state of readiness to respond when needed.

Numerous cases have specifically held that dredging, dike, revetment and similar activities on navigable rivers constitute engaging in interstate commerce. The case of *Walling v. Patton-Tulley Transportation Co.*, 134 F.2d 945 (6th Cir. 1943), involved employees engaged on dike and revetment construction on the Mississippi River under contracts of their employer with the United States. The court there noted that "the Mississippi River has been a highway of interstate commerce since states were first carved out of its contributory territory We have no difficulty in concluding that the dike and revetment employees of the appellee were engaged in interstate commerce" Cases specifically holding dredges to be included in interstate commerce include *Ritch v. Puget Sound Bridge and Dredging Co., Inc.*, 156 F.2d 334 (9th Cir. 1946); *Walling v. Sternberg Dredging Co.*, 64 F. Supp. 758 (E.D. Mo. 1946), *aff'd* 158 F.2d 678 (8th Cir. 1946); and *Cuascut v. Standard Dredging Corp.*, 94 F. Supp. 197 (D.P.R. 1950).

Several decisions have further held that repairmen and watchmen of vessels temporarily removed from service are engaged in interstate commerce. Repairmen and watchmen on vessels temporarily removed from service

while being repaired continued to be engaged in interstate commerce, since the vessels retain their status as instrumentalities of interstate commerce during such times of being temporarily out of service. *Craig v. Heide and Co.*, 94 F. Supp. 442 (E.D.N.C. 1951); *Slover v. Walthen*, 140 F.2d 258 (4th Cir. 1944); *Walling v. Keansburg Steamboat Co.*, 162 F.2d 405 (3d Cir. 1947); and *Divins v. Hazeltine Electronics Corp.*, 163 F.2d 100 (2d Cir. 1947). Since the *Lenel Bean* remained such an instrumentality of interstate commerce while anchoring during high water and since its crew continued to be engaged in interstate commerce, the *Lenel Bean* itself remained exempt from the sales and use tax.

SUMMARY

The Tennessee legislature has exempted vessels such as the *Lenel Bean* from sales and use taxation, and the Tennessee Supreme Court in *Herbert* has construed the exemption to apply even to a vessel which seldom leaves the waters of the State of Tennessee. A dredge is an instrumentality of interstate commerce; the *Lenel Bean* has been used at all times in interstate commerce, never having been used on local or intrastate projects; and has always been maintained in a state of readiness to respond as needed to perform its intended function. Anchoring of the vessel during periods of high water does not remove the vessel from interstate commerce, and the *Lenel Bean* has not been stored for use or consumption in Tennessee.

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It is respectfully submitted that the *Lenel Bean* is exempt from Tennessee sales and use taxation.

Respectfully submitted,

.....
BOYD L. RHODES, JR. (7966)
Attorney for Plaintiff

OF COUNSEL:

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ADAMS, WILLIAMS & KIRSCH
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument has been served on opposing counsel by depositing a copy in the U.S. mail, postage prepaid, this — day of April, 1986.

BLR7A/E8672-03

.....

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

BEAN DREDGING)	
a Louisiana corporation,)	
)	
Plaintiff,	)	No. 90712-2 R.D.
)	
v.)	
)	
MARTHA B. OLSEN,)	
Commissioner of Revenue of the)	
State of Tennessee,)	
)	
Defendant.)	

ANSWERS TO INTERROGATORIES

To: Boyd L. Rhodes, Jr., Esq.
Attorney for Plaintiff
Heiskell, Donelson, Bearman,
Andrews, Williams & Kirsch
6750 Poplar Avenue
Suite 308
Memphis, Tennessee 38138

The following are the answers of the defendant, Donald W. Jackson, successor to Martha B. Olsen, Commissioner of Revenue for the State of Tennessee, to the interrogatories numbered 1 through 22, directed to the defendant, to be answered pursuant to Rule 33 of the Tennessee Rules of Civil Procedure:

Interrogatories

Interrogatory No. 1: State the name and capacity of each person who participated in preparing responses to these interrogatories.

Response No. 1: Fred Bracey, Director, Sales and Use Tax Division. Brenda M. Bibb, Staff Attorney

Interrogatory No. 2: State any facts, other than the auditor's Field Audit Summary, which are the basis for Defendant's determination that the use taxes, penalty, and interest have been imposed properly in this case and that Plaintiff's dredging vessels are legally subject to Tennessee use taxes.

Response No. 2: The barge was stored for a period of four to six months at McKeller Lake in Memphis, Tennessee. The removal of the barge from continuous use in interstate commerce precludes it from being exempt pursuant to T.C.A. § 67-6-321.

Interrogatory No. 3: Identify any taxpayers owning or using vessels or barges in excess of fifty (50) tons displacement used in navigable waters of the state of Tennessee upon whom Defendant has *performed audits* for years subsequent to 1972 of sale or use taxes and identify the vessels or barges against which such audits were made.

Response No. 3: This information cannot be furnished since it is confidential pursuant to T.C.A. § 67-1-1701 et seq.

Interrogatory No. 4: Identify any taxpayers owning or using vessels or barges in excess of fifty (50) tons displacement used in navigable waters of the state of Tennessee upon whom Defendant has *assessed* sales or use taxes for years subsequent to 1972 and identify the vessels or barges against which such assessments were made.

Response No. 1: See Response No. 3.

Interrogatory No. 5: Describe the method of computing the assessment of sales or use taxes on each vessel or barge identified in your answer to Interrogatory No. 4, and state each valuation method, proration factor, or other basis of assessing sales or use taxes on each such vessel or barge.

Response No. 5: See Response No. 3.

Interrogatory No. 6: State the facts which are the basis for Defendant's decision *not to assess* sales or use taxes on each taxpayer, vessel, or barge identified in your answer to Interrogatory No. 3 as having been *audited*, but against which no assessment was made.

Response No. 6: Pursuant to T.C.A. § 67-1-1701 et seq. this material is confidential and cannot be released.

Interrogatory No. 7: As used in the context of sales and use taxation, state Defendant's understanding and definition of the following terms:

- (a) displacement
- (b) vessels or barges
- (c) dredge or dredging plant
- (d) localized for use within the state
- (e) used in interstate commerce
- (f) instrumentality of interstate commerce
- (g) continuously used in interstate commerce
- (h) come to rest
- (i) mass of property
- (j) component part
- (k) integral part
- (l) appropriate type activity to remove from interstate commerce

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Response No. 7: a) Displacement is the weight or volume of fluid displaced by a floating body:

b) A barge is a large flat-bottomed boat that is normally unpowered, towed by other crafts and used for transporting freight. A vessel is a craft designed to navigate on water.

c) A dredge or a dredging plant is a machine that is equipped with a scooping device and used to deepen harbors and waterways.

d) "Localized for use within the state" means items that come to rest in this state and become a part of the mass of property in this state.

e) "used in interstate commerce" means items of personal property which enter the state but do not come to rest in this state.

f) "Instrumentality of interstate commerce" includes rolling stock, aircraft and vessels.

g) "Continuously used in interstate commerce" means the constant flow of an item in interstate commerce as discussed in *T. L. Herbert & Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976).

h) "Come to rest" means to become or remain temporarily still as discussed in *T. L. Herbert & Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976).

i) "Mass of property" is any and all property located in the State of Tennessee as discussed in *T. L. Herbert & Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976).

j) Component part is a fundamental part of a system.

k) Integral part is a part essential for the completeness of something.

l) "Appropriate type activity to remove from interstate commerce" is loading or unloading cargo.

Interrogatory No. 8: State under what facts and circumstances Defendant considers vessels or barges in excess of fifty (50) tons displacement which have come to rest within the territory of Tennessee and which have become a part of the mass of property used in Tennessee nevertheless to be exempt from the tax imposed by the Retailer's Sales Tax Act, T.C.A. § 67-6-101 *et seq.*

Response No. 8: None.

Interrogatory No. 9: State whether Defendant considers it necessary for a vessel or barge in excess of fifty (50) tons displacement to physically leave the waters of the state of Tennessee in order to be exempt from the sales and use tax.

Response No. 9: Yes, if they are continuously used in rivers or waterways for the purposes of interstate commerce.

Interrogatory No. 10: Identify each taxpayer and each vessel or barge in excess of fifty (50) tons displacement which Defendant has subjected to sales or use taxation as a result, in whole or in part, of such vessel or barge being dry docked or tied up while undergoing repair services in the state of Tennessee.

Response No. 10: This information is confidential pursuant to T.C.A. § 67-1-1701 et seq. and cannot be revealed.

Interrogatory No. 11: State whether and to what extent Defendant considers the taxation of component parts of vessels or barges in excess of fifty (50) tons displacement to depend upon whether the component part is installed or affixed outside the state of Tennessee or inside the state of Tennessee.

Response No. 11: If the component part is installed in the State of Tennessee, it is taxable.

Interrogatory No. 12: State under what facts and circumstances Defendant *does not* assess a penalty on any deficiency in sales and use taxes.

Response No. 12: Penalty would not be assessed based upon the guidelines set forth in T.C.A. § 67-1-802. If penalty is assessed it may be waived under the criteria set forth in T.C.A. § 67-1-803.

Interrogatory No. 13: State how long a vessel or barge in excess of fifty (50) tons displacement may be tied up or docked in Tennessee before Defendant deems such vessel or barge to be outside the exemption of T.C.A. § 67-3012(8)(a) [now T.C.A. § 67-6-321].

Response No. 13: Any interval in which a vessel or barge is withdrawn from interstate commerce.

Interrogatory No. 14: State whether and to what extent your answer to Interrogatory No. 13 would vary if the reason the vessel or barge is tied up or docked is:

- (a) for repairs.
- (b) to offload cargo.
- (c) to load cargo.
- (d) to await assignment.
- (e) due to unavailability of work.
- (f) due to seasonal nature of the work performed or cargo handled by such vessel or barge.
- (g) due to weather conditions.
- (h) due to navigational conditions.
- (i) due to unavailability of crew members.

Response No. 14: a) for repairs: would still be taxable (sic).

b) to offload cargo: would be exempt as part of interstate commerce.

c) to load cargo: would be exempt as interstate commerce.

d) to await assignment: would be taxable.

e) due to unavailability of work: would be taxable.

f) due to seasonal nature of the work performed or cargo handled by such vessel or barge: would be taxable.

g) due to weather conditions: would be exempt as interstate commerce.

h) due to navigational conditions: would be exempt as interstate commerce.

i) due to unavailability of crew members: would be taxable.

Interrogatory No. 15: State the facts which are the basis for Defendant's denial of Paragraph 12 of the Complaint.

Response No. 15: The barge was withdrawn from dredging the Mississippi River and stored in Tennessee for maintenance activities.

Interrogatory No. 16: State the facts which are the basis for Defendant's denial of Paragraph No. 13 of the Complaint.

Response No. 16: The taxable incident occurred when the vessel was withdrawn from interstate commerce and stored in Tennessee.

Interrogatory No. 17: State the facts which are the basis for Defendant's denial of Paragraph No. 14 of the Complaint.

Response No. 17: During the maintenance activities, the barge did not comply with the requirement of the statute for use in interstate commerce.

Interrogatory No. 18: State the names and addresses of each person who has knowledge or information that facts stated in your answer to Interrogatory No. 15 are true in whole or in part.

Response No. 18: 1) Virginia Adams, Auditor
Tennessee Department of
Revenue
500 Deaderick Street
Andrew Jackson State Of-
fice Building
Nashville, TN 37242

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- 2) Alene Gaines, Auditor
1705 Harrison Pike
Cleveland, TN 37311
- 3) John Cathcart, Audit Supervisor
Tennessee State Office
Building
2nd Floor West
540 McCallie
Chattanooga, TN 37402
- 4) Stephen Henley, Asst. Chief
of Field Audit
Tennessee Department of
Revenue
Andrew Jackson State Of-
fice Building
Nashville, TN 37242
- 5) Jim McLeod, Chief of Field
Audit
Tennessee Department of
Revenue
Andrew Jackson State Of-
fice Building
Nashville, TN 37242
- 6) John Wainscott, Assistant
Director
Sales and Use Tax Division
Tennessee Department of
Revenue
Andrew Jackson State Of-
fice Building
Nashville, TN 37242

- 7) John R. Gregory
former Director of Sales &
Use Tax Division
Heiskell, Donelson, Bearman,
Adams, Williams and
Kirsch
6750 Poplar Avenue,
Suite 308
Memphis, TN 38138
- 8) Fred Brace, Director
Sales and Use Tax Division
Tennessee Department of
Revenue
Andrew Jackson State Of-
fice Building
Nashville, TN 37242

Interrogatory No. 19: State the names and addresses of each person who has knowledge or information that facts stated in your answer to Interrogatory No. 16 are true in whole or in part.

Response No. 19: See Response No. 18.

Interrogatory No. 20: State the names and address of each person who has knowledge or information that facts stated in your answer to Interrogatory No. 17 are true in whole or in part.

Response No. 20: See Response No. 19.

Interrogatory No. 21: With respect to all witnesses who you will or may call as experts to give opinion testimony at the trial of this matter, state the following:

(a) Name and address:

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- (b) Name and address of each witness' employer or the organization with which the witness is associated in any professional capacity:
- (c) The field in which the witness is to be offered as an expert:
- (d) A summary of witness' qualifications within the field in which the witness is expected to testify:
- (e) The substance of the facts to which the witness is expected to testify:
- (f) The substance of the opinions as to which the witness is expected to testify and the summary of the grounds for each opinion:
- (g) State the dates and addresses of all reports rendered by such experts: and
- (h) Identify by date, author, and location any document relied upon by each such expert witness to support any opinion or fact which each such expert may be expected to testify, and identify each opinion and fact to which each document relate:

Response No. 21: None.

Interrogatory No. 22: State the names and addresses of each person, other than the auditors, Alene G. Gaines and Virginia N. Adams, who has knowledge or information that facts stated in your answer to Interrogatory No. 2 are true in whole or in part.

Response No. 22: See Response No. 18.

STATE OF TENNESSEE

DAVIDSON COUNTY

Fred Bracey, being duly sworn upon his oath deposes and says:

1. I am the Director of the Sales and Use Tax Division on the staff of Donald W. Jackson, Commissioner of Revenue for the State of Tennessee, the successor defendant in the above entitled action, and I am the agent of said Commissioner for the purpose of answering the interrogatories numbered 1, 2, 5, 7-9, 11, 13-22 served upon the Commissioner by plaintiff, Bean Dredging Corporation, on March 8, 1985, and for making this verification.

2. I have read the said interrogatories and the foregoing answers thereto are true according to the best of my knowledge, information and belief.

/s/ Fred Bracey
Director Sales and Use Tax
Division
April 3, 1985
Date

Subscribed and sworn to before me this the 3rd day of April, 1985.

/s/ Maxwell C. Green
Notary Public

My Commission Expires: July 21, 1985

STATE OF TENNESSEE

DAVIDSON COUNTY

Brenda M. Bibb, being duly sworn upon her oath deposes and says:

1. I am a Staff Attorney on the staff of Donald W. Jackson, Commissioner of Revenue for the State of Tennessee, the successor defendant in the above entitled action, and I am the agent of said Commissioner for the purpose of answering the interrogatories numbered 3, 4, 6, 10, and 12 served upon the Commissioner by plaintiff, Bean Dredging Corporation, on March 8, 1985, and for making this verification.

2. I have read the said interrogatories and the foregoing answers thereto are true according to the best of my knowledge, information and belief.

/s/ Brenda M. Bibb
Staff Attorney
April 3, 1985

Date

Subscribed and sworn to before me this the 3rd day of April, 1985.

/s/ Maxwell C. Green
Notary Public

My Commission Expires: July 21, 1985

STATE OF TENNESSEE
CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

(Filed December 13, 1983)

SUMMONS IN A
CIVIL ACTION

Heritage Plaza,
Suite 1700

File No. _____ R. D. Metairie, Louisiana

Bean Dredging Corporation

Home Address

Business Address

Home Address

Business Address

PLAINTIFF(S)

VS

Martha B. Olsen, Commissioner
of Revenue of State of Tennessee

DEFENDANT(S)

TO THE DEFENDANT: Home Address: Business Address:

Martha B. Olsen

Andrew Jackson
State Office
Building,
Nashville, TN
37242

You are hereby summoned and required to defend a
civil action by filing your answer with the Clerk and Mas-

ter of the Court and serving a copy of your answer to the Complaint on Boyd L. Rhodes, Jr., Plaintiff(s)' attorney, whose address is 2000 First Tennessee Bank Bldg., Memphis, TN 38103 within THIRTY (30) DAYS after this summons has been served upon you, not including the day of service. If you fail to do so, a judgment by default may be taken against you for the relief demanded in the Complaint. ISSUED _____, 19____.

JOHN C. ROBERTSON, CLERK and MASTER

By _____
Deputy Clerk and Master

* * *

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE
SUMMONS IN CIVIL ACTION

BEAN DREDGING)	
CORPORATION,	)	NO. _____ R. D.
a Louisiana Corp.,)	
	)	Came to hand _____
PLAINTIFF(S))	
	)	Boyd L. Rhodes, Jr.,
VS	)	Solicitor for
	)	Plaintiff(s)
MARTHA B. OLSEN,	)	No. 7966
Commission (sic) of Revenue)	
of the State of Tennessee,	)	Telephone No.
	)	(901) 526-2000
DEFENDANT(S))	

COST BOND

(Filed December 13, 1983)

WE, BEAN DREDGING CORPORATION as principal, and HEISKELL, DONELSON, BEARMAN, ADAMS, WILLIAMS & KIRSCH as surety, acknowledge ourselves indebted to Chancery Court of Shelby County, Tennessee in the sum of Two Hundred and Fifty Dollars, to be void if the said Bean Dredging Corporation plaintiff in a complaint which has this day been filed in the Chancery Court of Shelby County, against the said Martha B. Olsen, Commissioner of Revenue of the State of Tennessee, Defendant shall pay all costs as may be awarded against Plaintiff by the court in its decrees and orders in said cause.

This the 29th day of November A.D. 1983.

BEAN DREDGING CORPORATION

By: /s/ Boyd L. Rhodes, Jr.

Attorney in Fact

HEISKELL, DONELSON, BEARMAN,
ADAMS, WILLIAMS & KIRSCH

By: /s/ Boyd L. Rhodes, Jr.

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

BEAN DREDGING)	
CORPORATION,)	
a Louisiana corporation,)	
)	
Plaintiff,	)	NO. _____
)	
V.)	
)	
MARTHA B. OLSEN,)	
Commissioner of Revenue of the)	
State of Tennessee,)	
)	
Defendant.)	

COMPLAINT

(Filed December 13, 1983)

Comes now the Plaintiff, Bean Dredging Corporation, Inc., a Louisiana corporation, by and through its attorney of record, Boyd L. Rhodes, Jr., and would respectfully show unto the Court that:

1. Plaintiff is a Louisiana corporation, with its principal office at Heritage Plaza, Suite 1700, Metairie, Louisiana.

2. Defendant Martha B. Olsen is sued in her official capacity as Commissioner of Revenue for the State of Tennessee.

3. Plaintiff brings this action pursuant to Tennessee Code Annotated § 67-2301 *et seq.* and specifically T.C.A. § 67-2305, for the recovery of taxes and interest in the amount of Five Hundred Seventy-One Thousand Five

Hundred Fifty-Two and 43/100 Dollars (\$571,552.43) erroneously assessed and collected by the Defendant.

4. Plaintiff's principal business is the performance of dredging operations on various waterways. Sundry types of dredging vessels are employed by the Plaintiff in the course of its work. Plaintiff's services are required most often during low water level periods. Because of the seasonal nature of high and low water levels, it is often necessary to dock the dredging vessels during periods of high water. During the period from January 1, 1980 to December 31, 1982, Plaintiff performed dredging operations on the Mississippi River under three contracts with the United States Corps of Engineers. In the course of these operations, Plaintiff's dredging vessels moved in and out of the States of Tennessee, Arkansas, Mississippi and Louisiana. During the high water periods Plaintiff's dredging vessels were docked in Memphis, Tennessee.

5. Defendant submitted an assessment to Plaintiff requiring payment of use tax for the period from January 1, 1980, to December 31, 1982, in the amount of Five Hundred Thirty-Three Thousand One Hundred Thirty-Three and No/100 Dollars (\$533,133.00) plus penalty in the amount of One Hundred Thirty-Three Thousand Two Hundred Eighty-Four and No/100 Dollars (\$133,284.00) and interest in the amount of Sixty-Six Thousand Six Hundred Forty-Two and No/100 Dollars (\$66,642.00) for a total assessment of Seven Hundred Thirty-Three Thousand Fifty-Nine and No/100 Dollars (\$733,059.00).

6. The assessment was subsequently revised, and payment was demanded in the following amounts: use tax in the amount of Four Hundred Thousand Thirty-Seven and

41/100 Dollars (\$400,037.41) plus penalty in the amount of One Hundred Thousand Nine and 35/100 Dollars (\$100,009.35) and interest in the amount of Seventy-One Thousand Five Hundred Five and 67/100 Dollars (\$71,505.67), for a total assessment of Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars (\$571,552.43).

7. The assessment was made relative to the following vessels and instruments used by Plaintiff in the performance of its interstate operations:

A. The LENEL BEAN. The LENEL BEAN is a self-propelled, dust pan suction dredge. Its gross displacement is one thousand three hundred eighty-five (1,385) short tons. Its length, according to Coast Guard Registration No. 297573, is two hundred forty-five and five-tenths (245-5/10) feet, its width is forty (40) feet, and its depth is eight point six (8.6) feet.

B. The RICHELLE. The RICHELLE is a derrick barge. Its gross displacement is one hundred thirty-four (134) short tons. Its length, according to Coast Guard Registration No. 612597, is fifty-eight and one-tenth (58.1) feet, its width is thirty (30) feet, and its depth is five and five-tenths (5.5) feet.

C. The TENDER ROBYN. The TENDER ROBYN is a survey boat. Its gross displacement is thirty-three point twenty-five (33.25) short tons. Its length, according to Coast Guard Registration No. 603063, is thirty-eight and four-tenths (38.4) feet, its width is sixteen (16) feet, with its depth being five (5) feet.

D. The RECON IV. The RECON IV is a crew boat. Attached hereto as collective Exhibits "B-1" through

"B-9" inclusive, are receipts showing Louisiana sales taxes have been previously paid on the RECON IV in the amount of One Thousand Two Hundred Sixty-Five and 60/100 Dollars (\$1,265.60).

8. Also included in the assessment were:

A. *Barges 1601-1620.* These barges in fact are floating pontoons which are bolted or welded upon the LENEL BEAN. These pontoons constitute the pipeline through which the dredged material is displaced.

B. *Three drum hoist.* The three drum hoist is bolted onto the LENEL BEAN. It serves the function of hoisting the suction pipeline.

Without the pipeline and the three drum hoist, the LENEL BEAN would be unable to perform the essential task for which it is used. For this reason these integral component parts of the LENEL BEAN should be subject to taxation only as a part of the LENEL BEAN.

9. On August 18, 1983, Plaintiff paid, under protest, the amount of Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars (\$571,552.43) by check to an agent of Defendant in payment of the afore-said assessment. The check had the words "Paid Under Protest" typed on its face. By letter accompanying such payment, Plaintiff further notified Defendant that payment was made under protest. A copy of the check marked "Paid under protest" is attached hereto as Exhibit "A" and incorporated herein by reference.

10. At all times for which the tax was assessed there was in full force and effect T.C.A. §§ 67-3001 through 3056 and specifically T.C.A. §§ 67-3003 and 67-3005.

11. T.C.A. § 67-3008 expressly provides that the use tax is not imposed on property used within this state upon which a like tax equal to or greater in amount has been paid in another state. For this reason, the use tax imposed on the RECON IV is erroneous, illegal and void.

12. Pursuant to T.C.A. § 67-3012(8)(a) which specifically exempts the use of vessels or barges of fifty tons and more displacement so long as they are being used in interstate commerce, the vessels used by Plaintiff in excess of fifty tons of displacement are exempt from taxation and any imposition of use taxes on these vessels is erroneous, illegal and void.

13. The imposition of use taxes by the State of Tennessee on dredging vessels used in interstate commerce within and without this State is an unconstitutional encroachment on the power of the Congress of the United States to regulate commerce among the several states under Article I, Section 8 of the United States Constitution.

14. For the above reasons and others, Plaintiff is not and has not been subject to use taxes pursuant to the laws of the State of Tennessee on the use of the dredging vessels used in interstate commerce and, therefore, the assessment, payment and collection of the said Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars (\$571,552.43) of tax, penalty and interest on said dredging vessels were erroneous, illegal, void, and without any legal basis.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFF PRAYS:

1. That the Defendant be required to answer this Complaint.

2. That the Court declare that the Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars (\$571,552.43) paid to Defendant by Plaintiff as use tax, penalty and interest for the dredging vessels used in interstate commerce by Plaintiff was erroneously assessed and collected.

3. That it have judgment against the Defendant in the amount of Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars (\$571,552.43) or other such amount as the Court determines has been erroneously collected from the Plaintiff by Defendant, plus interest in the amount of fourteen percent (14%) or such other interest as determined reasonable and appropriate and that such interest awarded by this Court shall be computed from August 18, 1983.

4. In the event that the Court determines that the Plaintiff is not entitled to the relief as hereinbefore requested, Plaintiff requests that, because of the close nature of the questions presented, the Court determine that no interest and penalty should have been charged on the State's assessment.

5. That it have such other and further relief as it may be entitled to.

HEISKELL, DONELSON, BEARMAN,
ADAMS, WILLIAMS AND KIRSCH

By: /s/ Boyd L. Rhodes, Jr. (7966)

By: /s/ Kent Wunderlich (7987)

2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000

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Cost Bond

We acknowledged ourselves sureties in this action for costs not to exceed \$250.00.

HEISKELL, DONELSON, BEARMAN,
ADAMS, WILLIAMS & KIRSCH

By: /s/ Boyd L. Rhodes, Jr.

EXHIBIT "A"

Bean Dredging
Corporation

Remittance Advice

One Shell Square
Suite 3700
New Orleans, Louisiana 70139

BEAN

Invoice Date
8-17-83

Invoice Number

Net Amount
\$571,552.43

TAX, INTEREST, & PENALTY
PAID UNDER PROTEST

Bean Dredging
Corporation

Control Number
36725

One Shell Square
Suite 3700
New Orleans, Louisiana 70139

BEAN

TAX, INTEREST, & PENALTY
PAID UNDER PROTEST

First National Bank of Commerce 14-2 Date Check No. Amount
New Orleans, Louisiana 650 8-17-83 36725 \$571,552.43

Pay Exactly \$571,552 Dollars and 43 Cents To the Order of:

Tennessee Department of Revenue
/s/ Meredith H. Bean

PAID UNDER
PROTEST

(All of remaining Exhibits omitted in printing)

Law Offices

HEISKELL, DONELSON, BEARMAN,
ADAMS, WILLIAMS & KIRSCH

A Professional Corporation

Twentieth Floor

First Tennessee Building

Memphis, Tennessee 38103

(901) 526-2000

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David G. Williams
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Anne S. McPherson
H. Elizabeth Akins

Counsel

J. H. Shepherd
Robert M. Burton

A. L. Heiskell 1890-1980
E. B. Williams, Jr. 1899-1972

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August 18, 1983

Tax Enforcement Division
Tennessee Department of Revenue
P. O. Box 3287, Uptown Station
Nashville, Tennessee 37219
ATTEN: Ruth Hesson

RE: BEAN DREDGING CORPORATION
(Account # 2-720505712-001-3)
Sales and Use Tax January 1, 1980, to December 31,
1982

Dear Agent Hesson:

Enclosed is Bean Dredging Corporation check number 36725 in the amount of Five Hundred Seventy-one Thousand Five Hundred Fifty-two Dollars Forty-three cents (\$571,552.43) in payment of the tax, penalty, and interest reflected in Notice of Assessment and Demand of Payment dated July 25, 1983, from the Tennessee Department of Revenue.

This payment of tax, interest, and penalty is *PAID UNDER PROTEST*.

Please acknowledge receipt of the enclosed check and of the fact that the taxpayer has PAID UNDER PROTEST by executing and returning the enclosed copy of this letter.

Very truly yours,
Boyd L. Rhodes, Jr.

BLR/mkr
Enclosure

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CC: Mr. John R. Gregory, Director BBC: Mr. Bob Tareza
Attorney at law

Sales and Use Tax Division
Tennessee Department of Revenue
Andrew Jackson State Office Building
Nashville, Tennessee 37242

RECEIVED AND ACKNOWLEDGED this — day of
August, 1983.

Tennessee Department of Revenue

By:

Title:

Bean Dredging
Corporation

Remittance Advice

One Shell Square
Suite 3700
New Orleans, Louisiana 70139

BEAN

Invoice Date
8-17-83

Invoice Number

Net Amount
\$571,552.43

TAX, INTEREST, & PENALTY
PAID UNDER PROTEST

Bean Dredging
Corporation

Control Number
36725

One Shell Square
Suite 3700
New Orleans, Louisiana 70139

BEAN

TAX, INTEREST, & PENALTY
PAID UNDER PROTEST

First National Bank of Commerce 14-2 Date Check No. Amount
New Orleans, Louisiana 650 8-17-83 36725 \$571,552.43

Pay Exactly \$571,552 Dollars and 43 Cents To the Order of:

Tennessee Department of Revenue

/s/ Meredith H. Bean

PAID UNDER
PROTEST

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(SEAL)

STATE OF TENNESSEE
DEPARTMENT OF REVENUE
ANDREW JACKSON STATE OFFICE BUILDING
NASHVILLE, TENNESSEE 37242

July 25, 1983

CERTIFIED MAIL

In reply refer to
FILE: JOMcL

Bean Dredging Corp.

One Shell Square, Suite 3700

New Orleans, La. 70139

Audit No: 3010572

Debit No: 0206

2 720505712 001 3

Acct. No:

Gentlemen:

TYPE PAYMENT: 1

Auditors of this Division have completed and reviewed an audit of your books and records indicating that there is a deficiency in the payment of Sales and/or Use Tax due the State of Tennessee for the period of January 1, 1980 to December 31, 1982 inclusive. This deficiency is made up in the following amount of tax, penalty and interest:

REVISED ASSESSMENT

Tax	\$ 400,037.41
Penalty	100,009.35
Interest	71,505.67

TOTAL CK CA CD \$ 571,552.43

This is a Notice of Assessment and a Demand for Payment. Accordingly, you have until August 8, 1983 to pay this assessment or to show cause why the above amount of tax, penalty and interest is not due at this time. In the event payment is not made and you do not present facts to

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show why the amount is not due before that time, the Department will be required to proceed to collect it by means available to it. Interest will continue to accrue until paid.

Please submit attached copy of this letter with your payment.

Very truly yours,

/s/ JOHN R. GREGORY, DIRECTOR
Sales & Use Tax Division

JRG:JOMcL:dp

87-1508

No.

Supreme Court, U.S.
FILED
MAR 10 1988
JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

— 0 —
BEAN DREDGING CORPORATION,

Petitioner,

vs.

MARTHA B. OLSEN, COMMISSIONER
OF REVENUE OF THE STATE OF TENNESSEE,

Respondent.

— 0 —
**PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE
WESTERN GRAND DIVISION
AT JACKSON**

— 0 —
VOLUME II

Of Counsel:
HEISKELL, DONELSON,
BEARMAN, ADAMS,
WILLIAMS & KIRSCH
Boyd L. Rhodes, Jr.
R. Mark Glover
Twentieth Floor
First Tennessee Building
Memphis, TN 38103

BALDWIN & HASPEL
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1100 Poydras Street
New Orleans, LA 70163-2200
Telephone: (504) 585-7711
Counsel for Petitioner

141P20



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TENNESSEE
SALES & USE
TAX LAWS

(SEAL)

EXTRACTS OF RELATED LAWS
RULES AND REGULATIONS
AND OTHER INFORMATION
1980

TENNESSEE DEPARTMENT OF REVENUE

The names "Department of Finance and Taxation" and "Commissioner of Finance and Taxation", as used in this summary of laws, were changed to "Department of Revenue" and "Commissioner of Revenue" by Chapter 9, Public Acts of 1959, and made effective April 1, 1959, by executive order of the governor.

These designations are to be used interchangeably in this summary of laws.

CHAPTER I

TENNESSEE SALES AND
USE TAX LAWS

(Title 67, Chapter 30, "Tennessee Code Annotated")
Section 1. The Retailer's Sales Tax Act

(§§ 67-3001-67-3048)

SECTION.

- 67-3001. Short title-Additional tax.
- 67-3002. Definition of terms.
- 67-3003. Levy of tax-Rate.
- 67-3004. Application of property by contractor.
- 67-3005. Use tax on imports.
- 67-3006. Effective date of use tax.
- 67-3007. Interstate commerce exempt.

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- 67-3008. Credits for taxes paid in other states.
- 67-3009. Additional tax
- 67-3010. Religious publications exempt.
- 67-3011. Agricultural products exempt.
- 67-2012. Miscellaneous property exempt.
- 67-3013. Exemption of film and transcription rentals.
- 67-3014. Exemption of religious, educational, and charitable institutions.
- 67-3015. Computation on trade-ins.
- 67-3016. Collection from dealers.
- 67-2017. "Dealer" defined.
- 67-3018. Collection of tax from purchaser-Payment by dealer.
- 67-3019. Offer by dealer to absorb tax prohibited.
- 67-3020. Collection and payment by retailers.
- 67-3021. Deduction for accounting expenses.
- 67-3022. Monthly returns and payment.
- 67-3023. Payment of tax with return.
- 67-3024. Payment of tax on rentals or furnishing of things or services.
- 67-3025. Settlement of tax on quitting business-Collection of tax from debtor of dealer.
- 67-3026. Interest and penalties for delinquency-Extension of time for making return.
- 67-3027. Form of payment.
- 67-3028. Credit for sales returns and allowances.
- 67-3029. Estimate by commissioner of tax due.
- 67-3030. Examination of books and assessment in absence of dealer's return.

- 67-3031. Assessment of use tax by commissioner.
- 67-3032. Value of rental fixed by commissioner.
- 67-3033. Delinquency-Distress warrants—Collection of erroneous payments-Injunction-Lien-Recording.
- 67-3034. Records kept by dealers.
- 67-3035. Contents of dealers' records-Penalty for violations.
- 67-3036. Records kept by wholesalers and jobbers.
- 67-3037. Access to records of carriers.
- 67-3038. Importation permits.
- 67-3039. Importation without permit prohibited.
- 67-3040. Confiscation of vehicle used in illegal importation.
- 67-3041. Registration of sellers-Recall of certificate-Certiorari.
- 67-3042. Penalties for violations by dealers.
- 67-3043. Forms furnished by commissioner.
- 67-3044. Administration of oaths.
- 67-3045. Rules and regulations.
- 67-3046. Administrative costs-Rules concerning application of rate.
- 67-3047. Deposit and allocation of receipts.
- 67-3048. Implementation of chapter.

NOTE

The names "Department of Finance and Taxation" and "Commissioner of Finance and Taxation", as used in this summary of laws, were changed to "Department of Revenue" and "Commissioner of Revenue" by Chapter 9, Public Acts of 1959, and made effective April 1, 1959, by executive order of the governor.

These designations are to be used interchangeably in this summary of laws.

67-3001. *Short title—Additional tax.*—This chapter shall be known as the “Retailers’ Sales Tax Act” and the tax imposed by this chapter shall be in addition to all other privilege taxes. [Acts 1947, ch. 3, § 1; C. Supp. 1950, § 1248.50 (Williams, § 1328.22).]

67-3002. *Definition of terms.*—The following words, terms, and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except when the context clearly indicates a different meaning:

(a) “Persons” includes any individual, firm, co-partnership, joint adventure (sic), association, corporation, estate, trust, business trust, receiver, syndicate, any governmental agency whose services are essentially a private commercial concern, or other group or combination acting as a unit, in the plural as well as the singular number. It is further defined to include any political subdivision or governmental agency, including electric membership corporations or cooperatives, and utility districts, to the extent that such agency sells at retail, rents or furnishes any of the things or services taxable under this chapter.

(b) “Sale” means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication work, and the furnishing, repairing or serving for a consideration of any tangible personal property consumed on the premises of the person

furnishing, preparing, or serving such tangible personal property. "Sale" shall also mean such transfer of customized or packaged computer software, which is defined to mean, information and directions loaded into a computer which dictate different functions to be performed by the computer, whether contained on tapes, discs, cards, or other device or material. For such purpose, computer software shall be considered tangible personal property, however, the fabrication of software by a person for his own use or consumption shall not be considered a taxable "use" under subdivision (h) of this section or any other section of this chapter.

A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price shall be deemed a sale.

"Sale" includes the furnishing of any of the things or services taxable under this chapter.

(c)(1) "Retail sales" or a "sale at retail" means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, and shall mean and include all such transactions as the commissioner of revenue upon investigation finds to be in lieu of sales; provided that sales for resale must be in strict compliance with rules and regulations. Any dealer making a sale for resale which is not in strict compliance with rules and regulations shall himself be liable for and pay the tax.

"Retail sale" or "sale at retail" shall include the furnishing of things or services taxable under this chapter.

"Retail sale" or "sale at retail" includes the delivery in this state of tangible personal property by a retailer

who has no place of business in this state, if the delivery is made to a consumer in this state or to another person for redelivery to a consumer in this state pursuant to a retail sale made by such retailer to such consumer.

Nothing in this paragraph or the preceding paragraph shall be construed to impose a tax which is invalid either under the commerce clause or the due process clause of the United States Constitution. In addition, the department of revenue may enter into a reciprocal agreement with the comparable department of another state to furnish records concerning purchases made by citizens of the other state from a dealer in this state where the dealer collects neither a sales nor a use tax on such sales provided that the other state agrees to furnish the same records to this state and each sale is in excess of five hundred dollars (\$500). Provided further, all dealers in Tennessee making sales to purchasers in another state where no sales or use tax is collected shall furnish the department copies of all such invoices to suitable substitutes for sales in excess of five hundred dollars (\$500) with their monthly returns provided that the department notifies such dealers of the existence of a reciprocal agreement.

(2) The terms "sale at retail," "use," "storage," and "consumption" shall not include the sale, use, storage or consumption of industrial materials and explosives for future processing, manufacture or conversion into articles of tangible personal property for resale where such industrial materials and explosives become a component part of the finished product or are used directly in fabricating, dislodging, sizing, converting, or processing such materials or parts thereof, and such terms shall not include materials, containers, labels, sacks, bags or bottles used for pack-

aging tangible personal property when such property is either sold therein directly to the consumer or when such use is incidental to the sale of such property for resale.

(3) The term "gross sales" means the sum total of all retail sales of tangible personal property and all proceeds of services taxable under this chapter as defined herein, without any deduction whatsoever of any kind or character, except as provided in this chapter.

(4) "Retail sale," "sale at retail," and "retail sales price" shall include the following services:

(A) The sale, rental or charges for any rooms, lodgings, or accommodations furnished to transients by any hotel, inn, tourist court, tourist camp, tourist cabin, motel, or any place in which rooms, lodgings or accommodations are furnished to transients for a consideration. The tax shall not apply, however, to rooms, lodgings, or accommodations supplied to the same person for a period of ninety (90) continuous days or more.

(B) Charges for services rendered by persons operating or conducting a garage, parking lot or other place of business for the purpose of parking or storing motor vehicles. The tax shall not apply, however, to charges for such services made by the state and its political subdivisions when providing on-street parking space for which charges are collected or when operating or conducting a garage or parking lot which is unattended and such charges are collected by parking meters.

(C) The furnishing of telephone service to regular subscribers, such service embracing local (flat charge or metered) calls, long-distance calls, leased lines or equipment for the vocal or written transmission of messages,

as well as any additional or incidental services for which a charge is made; and the transmission for a consideration of messages by telegraph;

(D) The performing for a consideration of any repair services with respect to any kind of tangible personal property;

(E) The laundering or dry cleaning of any kind of tangible personal property, excluding coin-operated laundry, dry-cleaning or car-wash facilities, where a charge is made therefor;

(F) The installing of tangible personal property which remains tangible personal property after installation where a charge is made for such installation whether or not such installation is made as an incident to the sale thereof and whether or not any tangible personal property is transferred in conjunction with such installation service.

(G) The enriching of uranium materials, compounds, or products, which is performed on a cost-plus basis or on a "toll enrichment fee" basis.

(d) "Sales price" means the total amount for which tangible personal property is sold, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, losses, or any other expense whatsoever; provided, that cash discounts allowed and taken on sales shall not be included; provided, that the term "sales price" shall not include any additional consideration given by the purchaser for the privilege of making deferred payments regardless

of whether such additional consideration shall be known as interest, time price differential on conditional sales contracts, carrying charges or any other name by which it shall be known.

(e) "Cost price" means the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor, or service costs, transportation charges, or any expenses whatsoever.

(f) "Lease or rental" means the leasing or renting of tangible personal property and the possession or use thereof by the lessee or renter for a consideration, without transfer of the title of such property.

(g) "Storage" means and includes any keeping or retention in this state of tangible personal property for use or consumption in this state, or for any purpose other than sale at retail in the regular course of business.

(h) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business.

(i) "Business" includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit, or advantage, either direct or indirect. The term "business" shall not be construed in this chapter to include occasional and isolated sales or transactions by a person who does not hold himself out as engaged in business, or the occasional and isolated sale at retail or use of services sold by or purchased from a person not regularly engaged in business as a vendor of taxable

services or from one who is such a vendor but is not normally a vendor with respect to the services sold or purchased in such occasional or isolated transaction. Provided, however, that it shall be construed to include occasional and isolated sales or transactions by such a person involving aircraft, vessels or motor vehicles, (which terms shall be construed to include trailers and special motor equipment sold in conjunction therewith), as defined by and required to be registered under the laws of Tennessee with an agency of this state or under the laws of the United States with an agency of the federal government, unless such sales or transactions are otherwise exempt under this chapter or are sales between persons who are: married, lineal relatives or spouses of lineal relatives, or siblings. Such sales or transactions involving aircraft based in this state shall be presumed to be made and taxable in this state; and any registration reflecting such aircraft which are so based shall constitute evidence thereof. Provided further, however, that it shall not be construed to include those occasional or isolated sales or transactions by such a person involving mobile homes or house trailers, as defined by § 59-421, when the consummation of such exclusively involves the assumption by the purchaser of a previously existing finance contract and no other consideration is received by the seller.

(j) "Retailer" means and includes every person engaged in the business of making sales at retail, or for distribution, or use, or consumption, or storage to be used or consumed in this state or furnishing any of the things or services taxable under this chapter.

(k) The term "commissioner" means and includes the commissioner of finance and taxation of the state of Tennessee, or his duly authorized assistants.

(l) "Tangible personal property" means and includes personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, insurance, or other obligations or securities.

(m) The term "use tax" referred to in this chapter includes the "use," the "consumption," the "distribution," and the "storage" as herein defined.

(n) "Industrial machinery" shall mean machinery, including repair parts and any necessary repair or taxable installation labor therefor, which is directly and primarily utilized in fabricating or processing tangible personal property for resale, or equipment primarily used for air pollution control or stream pollution control, where the use of such machinery or equipment is by one who engages in such fabrication or processing as his principal business either within or without this state, or such use by a county or municipality or a contractor pursuant to a contract with such county or municipality for use in stream pollution control or sewage systems. "Industrial machinery" shall also mean machinery, the cost of which, for any such single article, exceeds \$1,000.00, which is directly and primarily utilized for the purpose of remanufacturing industrial machinery as defined in the first paragraph of this subsection when such utilization is by one whose principal business is that of remanufacturing industrial machinery.

(o) "Fabricating or processing tangible personal property for resale" shall include only tangible personal property which is fabricated or processed for ultimate use or consumption off the premises of the one engaging in such fabricating or processing.

(p) "Farm equipment and machinery" shall mean any appliance used directly and principally for the purpose of producing agricultural products, including nursery products, for sale and use or consumption off the premises, the retail price of which, for any such single article, exceeds two hundred and fifty dollars (\$250), but shall not include an automobile, truck, household appliances or property which becomes real property when erected or installed. Notwithstanding the foregoing provisions, grain bins and attachments thereto which are sold to or used by a farmer shall be considered "farm equipment and machinery."

(q) Livestock and poultry feed means and includes all grains, minerals, salts, proteins, fats, fibers and all vitamins, acids and drugs used and mixed with said ingredients as a growth stimulant, disease preventive, to stimulate feed conversion and make a complete feed. [Acts 1947, ch. 3, § 2; C. Supp. 1950, § 1248.51 (Williams, § 1328.23); Acts 1951, ch. 3, § 1; modified; 1955, ch. 51, §§ 1-5; impl. am. Acts 1959, ch. 9, § 14; Acts 1959, ch. 15, § 1; 1963, ch. 38, §§ 1, 2, 7; 1963, ch. 172, §§ 1, 2; 1965, ch. 3, § 1; 1965, ch. 335, § 1; 1968 (Adj. S.), ch. 556, § 1; 1968 (Adj. S.), ch. 601, § 1; 1969, ch. 95, § 1; 1970 (Adj. S.), ch. 390, § 1; 1971, ch. 117, § 1; 1971, ch. 149, § 1; 1971, ch. 151, § 1; 1972 (Adj. S.), ch. 528, § 1; 1972 (Adj. S.), ch. 709, § 1; 1972 (Adj. S.), ch. 731, § 1; 1972 (Adj. S.), ch. 757, § 1; 1972 (Adj. S.), ch. 769, § 1; 1973, ch. 179, § 1; 1074 (Adj. S.), ch. 778, § 1; 1976 (Adj. S.), ch. 442, § 1; 1977, ch. 42, § 1; 1977, ch. 250, § 1; 1978 (Adj. S.), ch. 565, §§ 1, 2; 1978 (Adj. S.), ch. 789, §§ 1, 2; 1978 (Adj. S.), ch. 921, § 1; 1979, ch. 352, § 1; 1980, ch. 602, § 1.]

67-3003. *Levy of tax—Rate.*—It is declared to be the legislative intent that every person is exercising a tax-

able privilege who engages in the business of selling tangible personal property at retail in this state, or who uses or consumes in this state any item or article of tangible personal property as defined in this chapter, irrespective of the ownership thereof or any tax immunity which may be enjoyed by the owner thereof, or who is the recipient of any of the things or services taxable under this chapter, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined in this chapter, or who leases or rents such property, either as lessor or lessee, within the state of Tennessee. For the exercise of said privilege, a tax is levied as follows:

(a) At the rate of three percent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale. Except that the rate of tax provided for in this paragraph shall be four and one-half percent (4½%) until June 30, 1981, at which time it shall be three percent (3%).

(b) At the rate of three percent (3%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax. Except that the rate of tax provided for in this paragraph shall be four and one-half percent (4½%) until June 30, 1981, at which time it shall be three percent (3%).

(c) At the rate of three percent (3%) of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, where the lease or rental of such property is an established business, or part of an established business, or the same is incidental or germane to said business. Except that the rate of tax provided for in this paragraph shall be four and one-half percent ($4\frac{1}{2}\%$) until June 30, 1981, at which time it shall be three percent (3%).

(d) At the rate of three percent (3%) of the monthly lease or rental price paid by lessee or renter, or contracted or agreed to be paid by lessee or renter, to the owner of the tangible personal property. Except that the rate of tax provided for in this paragraph shall be four and one-half percent ($4\frac{1}{2}\%$) until June 30, 1981, at which time it shall be three percent (3%).

(e) At the rate of three percent (3%) of the gross charge for all services taxable under this chapter. Except that the rate of tax provided for in this paragraph shall be four and one-half percent ($4\frac{1}{2}\%$) until June 30, 1981, at which time it shall be three percent (3%).

(f) The said tax shall be collected from the dealer as defined herein and paid at the time and in the manner as hereinafter provided.

(g) Notwithstanding other provisions of this chapter, tax imposed with respect to industrial machinery as defined in Section 67-3002 shall be at the following rate:

(a) July 1, 1980-June 30, 1981—.75%

(b) July 1, 1981-June 30, 1982—.50%

(c) July 1, 1982-June 30, 1983—.25%

On and after July 1, 1983 no tax is due with respect to industrial machinery.

Tax at the rate of one percent (1%) is likewise imposed with respect to water when sold to or used by manufacturers. Tax at the rate of one and one-half percent (1½%) shall be imposed with respect to gas, electricity, fuel oil, coal and other energy fuels when sold to or used by manufacturers. For the purpose of this provision a manufacturer is defined as one whose principal business is fabricating or processing tangible personal property for resale. Provided, however, that such substances shall be exempt entirely from the taxes imposed by this chapter whenever it may be established to the satisfaction of the commissioner, by separate metering or otherwise, that they are exclusively used directly in the manufacturing process, coming into direct contact with the article being fabricated or processed by the manufacturer, and being expended in the course of such contact. Whenever the commissioner determines that the use of such substances by a manufacturer meets said test, he shall issue a certificate evidencing the entitlement of the manufacturer to said exemption, and a certified copy thereof shall be furnished by the manufacturer to his supplier of such exempt substances. Said certificate may be revoked by the commissioner at any time upon a finding that the conditions precedent to the exemption no longer exist. His action as to the granting or revoking of a certificate shall be reviewable solely by a petition for common law certiorari addressed to the chancery court of Davidson County.

Provided further that any water or energy fuel used by a manufacturer in fabricating or processing tangible

personal property for resale shall be exempt entirely from the taxes imposed by this chapter when same are produced or extracted by the manufacturer himself from facilities owned by him or in the public domain.

(h) Notwithstanding other provisions of this chapter, tax imposed with respect to farm equipment and machinery as defined in Section 67-3002 shall be at the following rate:

- (a) July 1, 1980-June 30, 1981—.75%
- (b) July 1, 1981-June 30, 1982—.50%
- (c) July 1, 1982-June 30, 1983—.25%

On and after July 1, 1983 no tax is due with respect to farm equipment and machinery.

(i) Tax at the rate of one and one-half percent ($1\frac{1}{2}\%$) shall be imposed with respect to gas, electricity, fuel oil, coal and other energy fuels sold directly to the consumer for residential use. The Commissioner of Revenue is authorized to promulgate such rules and regulations as he considers necessary for the administration of this subsection. [Acts 1947, ch. 3, § 3; C. Supp. 1950, § 1248.52 (Williams, § 1328.24); Acts 1955, ch. 51, §§ 7, 8; 1955, ch. 242, § 6; 1959, ch. 15, § 2; 1963, ch. 38, §§ 3, 5; 1963, ch. 172, § 3; 1965, ch. 335, § 2; 1971, ch. 78, § 1; 1971, ch. 117, § 2; 1972 (Adj. S.), ch. 653, § 1; 1973, ch. 239, § 1; 1974 (Adj. S.), ch. 675, § 1; 1975, ch. 316, § 1; 1976 (Adj. S.), ch. 466, §§ 1, 3; 1977, ch. 178, § 1; 1978 (Adj. S.), ch. 592, § 1; 1979, ch. 308, §§ 1, 2; 1980, ch. 871, §§ 1, 2; 1980, ch. 886, § 1.]

67-3004. *Application of property by contractor.*—Where a manufacturer, producer, compounder or contractor

erects or applies tangible personal property, which he has manufactured, produced, compounded or severed from the earth, other than: (1) any severed from the earth and moved from one (1) place to another on the same job site; and (2) dirt, soil, earth or any other kind of material when used for construction or fill, whether from the same construction or job site or elsewhere, such person so using the tangible personal property shall pay the tax herein levied on the fair market value of such tangible personal property when used, without any deductions whatsoever, provided, however, the foregoing shall not be construed to apply to contractors or subcontractors who fabricate, erect or apply tangible personal property which becomes a component part of a building, and which is not sold by them as a manufactured item.

Where a contractor or subcontractor hereinafter defined as a dealer, uses tangible personal property in the performance of his contract, or to fulfill contract or subcontract obligations, whether the title to such property be in the contractor, subcontractor, contractee, subcontractee, or any other person, or whether the title holder of such property would be subject to pay the sales or use tax, except where the title holder is a church and the tangible personal property is for church construction, such contractor or subcontractor shall pay a tax at the rate prescribed by § 67-3003 measured by the purchase price or fair market value of such property, whichever is greater, unless such property has been previously subjected to a sales or use tax, and the tax due thereon has been paid.

Provided, however, that the tax imposed by this section shall have no application where the contractor or

subcontractor, and the purpose for which such tangible personal property is used, would be exempt from the sales or use tax under any other provision of this chapter.

Provided, further, that the tax imposed by this section or by any other provision of this chapter, as amended shall have no application with respect to the use by, or the sale to, a contractor or subcontractor of atomic weapon parts, source materials, special nuclear materials and by-product materials, all as defined by the Atomic Energy Act of 1954, or with respect to such other materials as would be excluded from taxation as industrial materials under paragraph (c)2 of § 67-3002 when the items referred to in this proviso are sold or leased to a contractor or subcontractor for use in, or experimental work in connection with, the manufacturing processes for or on behalf of the atomic energy commission or when any of such items are used by a contractor or subcontractor in such experimental work or manufacturing processes.

Provided, further, that there is hereby exempted from the provisions of this chapter, the sale or use of materials and equipment purchased or used for construction or installation, by a contractor, subcontractor or otherwise, of, in or as part of any electric generating plant or distribution system, any resource recovery facility where steam or electric energy is produced, or any coal gasification plant or distribution system owned or operated by the United States or any agency thereof created by an act of congress, or by the state of Tennessee or any agency or political subdivision thereof, or any authority organized pursuant to the state electric membership corporation law or the electric cooperative law. There is also exempted the sale

or use of materials and equipment purchased or used for construction or installation by a contractor, subcontractor or otherwise, of, in or as a part of any electric generating plant, including the transmission substation, owned or operated by any person so long as such person does not now or intend in the future to generate electricity from a plant located in Tennessee or to distribute electricity to consumers in Tennessee.

Provided further, that notwithstanding § 67-3018, no sales or use tax shall be payable on account of any direct sale or lease of tangible personal property or services to the United States, or any agency thereof created by congress, for consumption or use directly by it through its own government employees. [Acts 1949, ch. 245, § 1; C. Supp. 1950, § 1248.52 (Williams, § 1328.24); Acts 1955, ch. 242, § 7; 1957, ch. 166, § 1; 1963, ch. 38, § 6; 1963, ch. 174, § 1; 1978 (Adj. S.), ch. 536, § 1; 1978 (Adj. S.), ch. 601, § 1; 1980, ch. 563, § 1; 1980, ch. 812, § 1.]

67-3005. *Use tax on imports.*—On all tangible personal property imported, or caused to be imported from other states or foreign country, and used by him, the “dealer” as defined in § 67-3017, shall pay the tax imposed by this chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

It is not the intention of this section to levy the Use Tax with respect to the personal automobile, the personal effects, or the household furniture to be used in the residence of a person who having been a bona fide resident of another state, has moved to and become a resident of Tennessee, and has caused to be imported into Tennessee such personal automobile, personal effects, or household furnishing. [Acts 1947, ch. 3, § 4; C. Supp. 1950, § 1248.55 (Williams, § 1328.25); Acts 1967, ch. 117, § 1.]

67-3006. *Effective date of use tax.*—It is further specifically provided that the “use tax” shall not apply to tangible personal property owned or acquired in this state, or imported into this state, or held or stored in this state prior to January 24, 1947. But, the “use tax” will apply to all tangible personal property imported or caused to be imported into this state on or after January 24, 1947, unless said property has previously borne a sales or use tax in another state equal to or greater than the tax imposed by this chapter. [Acts 1947, ch. 3, § 4; C. Supp. 1950, § 1248.58 (Williams, § 1328.25).]

67-3007. *Interstate commerce exempt.*—It is not the intention of this chapter to levy a tax upon articles of tangible personal property imported into this state or produced or manufactured in this state for export; nor is it the intention of this chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state. [Acts 1947, ch. 3, § 4; C. Supp. 1950, § 1248.56 (Williams, § 1328.25).]

67-3008. *Credits for taxes paid in other states.*—The provisions of this chapter shall not apply in respect to the use or consumption, or distribution, or storage of tangible personal property for use or consumption in this state upon which a like tax equal to or greater than the amount imposed by this chapter has been paid in another state, the proof of payment of such tax to be according to rules and regulations made by the commissioner. If the amount of tax paid in another state is not equal to or greater than the amount of tax imposed by this chapter, then the dealer shall pay to the commissioner an amount sufficient to make the tax paid in the other state and in this state equal to the amount imposed by this chapter. [Acts 1947, ch. 3, § 4; C. Supp. 1950, § 1248.57 (Williams, § 1328.25); Acts 1957, ch. 63, § 1; 1967, ch. 117, § 2.]

67-3009. *Additional tax.*—The tax so levied is and shall be in addition to all other taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to all other fees and taxes levied. [Acts 1947, ch. 3, § 3; C. Supp. 1950, § 1248.52 (Williams, § 1328.24).]

67-3010. *Religious publications exempt.*—The taxes levied under this chapter shall not apply to the use, sale, or distribution of religious publications to or by churches or other religious or charitable institutions for use in the customary religious or charitable activities. [Acts 1947, ch. 3, § 4; C. Supp. 1950, § 1248.59 (Williams, § 1328.25).]

67.3011. *Agricultural products exempt.*—(a) The gross proceeds derived from the sale in this state of live-stock, nursery stock, poultry, and other farm or nursery products direct from the farm are exempted from the tax levied by this chapter, provided that such sales are made

directly by the producers. When sales of livestock, nursery stock, poultry, or other farm or nursery products are made to consumers by any other person, as defined herein, other than producer, they are not exempted from the tax imposed by this chapter.

(b) It is specifically provided that the "use tax" as defined herein shall not apply to livestock and livestock products, to poultry and poultry products, to farm, nursery and agricultural products, when produced by the farmer or nurseryman and used by him and members of his family.

(c) Provided, however, that each and every agricultural commodity sold by any person, other than a producer, to any other person, who purchases not for direct consumption but for the purpose of acquiring raw products for use or for sale in the process of preparing, finishing, or manufacturing such agricultural commodity for the ultimate retail consumer trade shall be and is exempted from any and all provisions of this chapter, including payment of the tax applicable to the sale, storage, use, transfer, or any other utilization or handling thereof, except when such agricultural commodity is actually sold as a marketable or finished product to the ultimate consumer, and in no case shall more than one (1) tax be exacted.

The term "agricultural commodity," for the purposes hereof, shall mean horticultural, poultry, and farm products, and livestock and livestock products. [Acts 1947, ch. 3, § 5; C. Supp. 1950, § 1248.60 (Williams, § 1328.26); Acts 1978 (Adj. S.), ch. 921, §§ 2, 3.]

67-3012. *Miscellaneous property exempt.*—(1) The sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of the follow-

ing tangible personal property is specifically exempted from the tax imposed by this chapter:

(a) Gasoline as defined by statute in Tennessee, upon which a privilege tax per gallon is paid, and not refunded, or gasoline or diesel fuel used for "agricultural purposes" as this term is defined in § 67-3602. For purposes of this subpart "diesel fuel" means any petroleum distillate with at least twelve (12) to sixteen (16) carbon atoms per molecule and which has a boiling point of between 350 degrees (350°) and 650 degrees (650°) F. or any petroleum distillate which is ordinarily and customarily sold and used as a source of fuel for diesel engines;

(b) Motor vehicle fuel now taxed per gallon by chapter 37 of this title;

(c) Newspapers;

(d) Seedlings, or plants grown from seed when sold directly to the farmer and nurseryman;

(e) Fertilizer and containers used for farm products and field and garden seeds when sold directly to the farmer and nurseryman;

(f) Insecticide and pesticide chemicals when sold directly to and used by the farmer and nurseryman;

(g) Fungicide chemicals when sold directly and used by the farmer and nurseryman;

(h) Herbicide chemicals when sold directly to the farmer and nurseryman used to destroy or prevent the growth of weeds and bushes;

(i) Livestock and poultry feeds;

(j) Shoppers' advertisers using newsprint distributed in Tennessee or within a twenty-five (25) mile radius thereof at regular intervals and provided without charge to the shopper;

(k) Caskets and burial vaults used in the burial of the dead, up to or not to exceed five hundred dollars (\$500);

(l) School books and school lunches;

(m) All sales made to the state of Tennessee or any county or municipality within the state; and

(n) Hearing aids, as this term is defined in § 63-1502(3).

(2) There shall also be exempt from the provisions of this chapter all sales of tangible personal property to telephone cooperatives organized under the general welfare laws of this state. The exemption provided for herein shall apply only to sales of tangible personal property to telephone cooperatives for their own use and consumption, and shall not apply to any purchases made by the said telephone cooperatives for use by independent contractors. This paragraph shall apply only so long as electric membership corporations organized under the electric membership corporation law and electric cooperatives organized under the electric cooperative law, shall be entitled to an exemption from the payment of any sales and use tax.

(3) There shall further be exempted all sales of tangible personal property to commercial marine vessels for use by such vessels where the deliveries of such property are made in mid-stream of waterways constituting geographical boundaries of this state. Dealers shall, however, be required to support such sales by bills of sale

positively reflecting such delivery receipted by the master of the deliverer vessel.

(4) There shall also be exempt from sales tax any replacement parts or goods transferred without cost to a purchaser for the replacement of faulty parts or equipment which prior thereto had been sold under a warranty or guarantee or condition and upon which original purchase or importation a sales or use tax was paid.

(5) There shall also be exempt from sales or use tax the transfer, by any dealer in personal property, of any item from inventory to be used for demonstration purposes; provided that such article of personal property shall be returned to inventory for sale in the usual course of trade within one hundred twenty (120) days; if such article of personal property is used for demonstration purposes for a period in excess of one hundred twenty (120) days the dealer shall pay a use tax thereon for the amount that the cost of the article to the dealer exceeds the sales price of the article upon which sales tax is regularly assessed and paid when it is subsequently sold to a consumer.

(6) There shall also be exempt from sales and use tax the sale, at retail, for out-of-state use, of motor vehicles which are not to be registered, titled and used in this state. Use of a vehicle so sold, for transportation by the purchaser or his agent from point of purchase within this state to a point outside of this state, by direct route, not more than three (3) calendar days following the date noted upon the bill of sale, shall not constitute such usage as to remove tax exemption from such sale.

(7) There shall also be exempt from sales or use tax, the sale, use, storage or consumption of parts, accessories, materials and supplies sold to or used by commercial interstate or international air carriers for use exclusively in servicing and maintaining such carriers' aircraft, which aircraft are used principally in interstate or international commerce. This exemption shall not apply to fuel and other petroleum products or to shop equipment and tools.

(8) [Effective January 1, 1980] There shall also be exempt from sales tax the transfer, by any dealer in personal property, of railroad rolling stock or of vessels or barges of fifty (50) tons or over of displacement where the purchaser gives the seller an affidavit that such vessels or rolling stock are being purchased for use in interstate commerce or outside the state of Tennessee; and any such vessel or rolling stock shall also be exempt from use tax so long as it is being used in interstate commerce.

(9) There shall be exempt from the tax imposed by this chapter any prescription drug or medicine issued by a licensed pharmacist in accordance with an individual prescription written for the use of a human being by a practitioner of the healing arts licensed by the state of Tennessee.

There shall also be exempt from the tax imposed by this chapter any prescribed drug or medicine sold to a practitioner of the healing arts licensed by the state of Tennessee or issued by a licensed pharmacist for use in the treatment of a human being.

(10) An optometrist, optician or ophthalmologist shall be considered the user and consumer of the tangible

personal property used in the practice of his profession, and the tax levied under this chapter shall not be applicable to all or any part of the charge made by such persons to their patients. All sales of tangible personal property and taxable services to an optometrist, optician or ophthalmologist shall be subject to the sales or use tax.

(11) There shall also be exempt from sales and use tax the transfer between spouses of an automobile when such transfer is the result of a decree of divorce terminating that marriage.

(12) There shall also be exempt from the tax imposed by this chapter any sales of oxygen prescribed or recommended for the medical treatment of a human being by a licensed practitioner of the healing arts, and equipment necessary to administer such oxygen.

(13) There shall also be exempted any sale of a motor vehicle to a nonresident member of a uniformed service, as defined in the Internal Revenue Code of 1954, stationed under orders of their branch of service on a military reservation located partially within the boundary of Tennessee and that of another state. Dealers shall support each such sale by attachment to their file copy of the invoice evidencing it a copy of the official orders relating to stationing of the purchaser and proof of non-residency. This exemption shall terminate upon publication in the Tennessee administrative register of a certification made by the commissioner of revenue to the secretary of state that a substantially identical exemption is no longer accorded by the other state whose boundary encompasses the other portion of a military reservation located only partially within the boundary of this state.

(14) There shall also be exempt from the sales and use tax samples produced by a pharmaceutical plant within the state for future distribution outside of the state or temporarily stored by such pharmaceutical plant within the state for future distribution outside of the state.

(15) Sales to or used by a contractor, subcontractor or material vendor of tangible personal property, including rentals thereof and labor or services performed in the fabrication, manufacture, delivery or installation of such tangible personal property, if that property is sold or used solely in the performance of a preexisting lump sum or unit price construction contract shall be exempt from the payment of the state rate of tax as provided in this chapter, at a rate in excess of that as provided by law March 31, 1976. For the purpose of this paragraph the term "preexisting lump sum or unit price construction contract" shall mean a written contract for the construction of improvements to real property under which the amount payable to the contractor, subcontractor or material vendor is fixed without regard to the costs incurred by him in the performance thereof, and which was entered into prior to April 1, 1976. Upon the application of any person, including a contractor, subcontractor, or material vendor, claiming the exemption in this paragraph, the commissioner is authorized to issue exemption certificates to such persons which, in his judgment, are entitled thereto. The commissioner of revenue is authorized to make final determination after hearing, if demanded, as to whether any person is entitled to the benefit of the exemption established by this paragraph. In the event any contractor, subcontractor or material vendor, pursuant to a preexisting lump sum or unit price construction contract, has paid the state sales

tax at a rate in excess of the rate provided by law in effect on March 31, 1976, upon the application of any person claiming the benefit of the exemption established by this paragraph, the commissioner of revenue shall issue to such taxpayer, in his capacity as a dealer, an official credit memorandum equal to the net amount paid by such taxpayer in excess of such rate. Such memorandum shall be accepted by the commissioner at full face value from the dealer to whom it is issued, in the remittance for subsequent taxes accrued under the provisions of this chapter, provided that in cases where a dealer has retired or has otherwise withdrawn from business and has filed a final return, or in cases where the dealer has anticipated tax liability which is insufficient, in the determination of the commissioner, to extinguish the credit within two years, a refund of tax shall be made to such dealer to the extent of the unused portion of such credit memorandum. Provided, however, all such refunds shall be made under the procedures and limitations set out in § 67-2301. The commissioner may, in his discretion, limit the credit allowable under this subdivision so that the credit will be allowed equally in the fiscal year in which claimed and the two succeeding fiscal years. Claims for credit under this subdivision shall be barred if not filed before September 30, 1978, or such later date which is within the limitations set forth in § 67-2301.

(16) There shall also be exempt from the tax imposed by this chapter the sale of human blood, blood plasma, or any part thereof by any institution or organization which has received a determination of exemption from the Internal Revenue Service under § 501(c)(3) of the Internal Revenue Code.

(17) There shall further be exempt from the sales and use tax the proceeds derived from sales at gun shows, displays or exhibits, sponsored by any nonprofit organization of gun collectors. This exemption shall not be applicable to any sale made by a person who regularly engages in business as a dealer in guns, or to any sale of a gun for future delivery.

(18) There shall also be exempt from sales and use tax the sale, at retail, of insulin and any syringe used to dispense insulin.

(19) There shall also be exempt from the sales tax imposed by this chapter the transfer of an artificial limb to a person who has need for such artificial limb due to his loss of an arm or leg or any part thereof and the retail sale of lift devices designed to permit ingress and egress of handicapped persons confined to wheelchairs from their personal motor vehicles. There shall also be exempt from the sales tax imposed by this chapter the sale of any item necessary for the use or wearing of any artificial limb and the sale of any necessary maintenance service on any artificial limb, lift device, or wheelchair to handicapped persons who use such items.

(20) There shall also be exempt from the tax imposed by this chapter the sale, transfer, or lease of industrial machinery, as that term is defined in Tennessee Code Annotated, Section 67-3002, to or from a parent corporation and a wholly owned subsidiary to the extent that such Tennessee sales and use tax applicable to such machinery has previously been paid by such parent or subsidiary corporations.

(21) There shall also be exempt from sales or use tax all sales of tangible personal property to watershed districts for use and consumption by such districts. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2, 1980, ch. 613, § 1; 1980, ch. 748, § 1; 1980, ch. 863, § 1.]

67-3013. *Exemption of film and transcription rentals.*—There shall also be exempted all rental from films to theaters which pay the privilege tax of two percent (2%) of their gross receipts, as provided by Item R of § 67-4102. There shall also be exempt from the provisions of this chapter all rental for films, transcriptions and recordings to radio stations and television stations operating under a certificate from the federal communications commission. [Acts 1951, ch. 172, § 1; 1953, ch. 128, § 1 (Williams, § 1328.27).]

67-3014. *Exemption of religious, educational, charitable and certain nonprofit organizations.*—(a) There shall be exempt from the provisions of this chapter any sales or use tax upon tangible personal property or taxable services sold, given, or donated to any:

- (1) Church;
- (2) University, including the Agricultural Foundation for Tennessee Tech, Inc.;
- (3) College;
- (4) School ;
- (5) Orphanage;
- (6) Institution organized for the principal purpose of placing homeless children in foster homes;
- (7) Home for the aged;
- (8) Hospital;
- (9) Girls' club;
- (10) Boys' club;
- (11) Community health council;
- (12) Volunteer fire department;
- (13) Organ bank for transplantable tissue;
- (14) Organization whose primary objective is to promote the spiritual and recreational environment of members of the armed services of the United States of America, such as the United Service Organization as it is presently conducted;
- (15) Historical property owned by the state and operated by the historical commission or under the jurisdiction of the commission as authorized by § 4-1108;
- (16) Nonprofit community blood banks;
- (17) Senior citizen service centers which meet the standards set by the Tennessee commisison on aging for eligibility to receive state funds;

(18) Nonprofit corporation whose primary function involves the annual organization, promotion, and sponsorship of a statewide talent and beauty pageant in which contestants compete for scholarships, awarded by such nonprofit corporation, as well as for the opportunity of being Tennessee's representative and contestant in an annual nationwide talent and beauty pageant with which such nonprofit corporation is affiliated.

(b) In addition to the exempt institutions, organizations and historical properties described in subsection (a) there shall also be exempt such other institutions and organizations which have received a determination of exemption from the Internal Revenue Service under § 501(c)(3) (42 U.S.C. § 501(c)(3) of the Internal Revenue Code and are currently operating under it.

(c) Any exemption granted under subsection (a) or (b) shall be limited to such institutions, organizations or historical properties which are not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(d) Any exemption granted under the preceding subsections shall only apply to sales, gifts, or donations made directly to the exempt institution, organization or historical property. There shall be no exemption upon sales, gifts, or donations made to an independent contractor with any such exempt institution, organization or historical property.

(e) No dealer shall sell, give, or donate and no user shall use any tangible personal property under the claim that the same is exempt from the sales or use tax levied by this chapter, where the exemption from taxation is claimed because the vendee or user is an educational, re-

ligious or charitable institution or organization or historical property and is entitled to an exemption as such institution or organization or historical property under subsections (a)-(d), unless the vendor or user shall have issued to it by the commissioner an exemption certificate declaring that such institution or organization or historical property is entitled to the exemption provided for by said paragraphs.

(f) The commissioner is authorized to make final determination after hearing, if demanded, as to whether any institution or organization or historical property is entitled to the benefit of the exemption established by said four (4) paragraphs. The commissioner is authorized to issue exemption certificates to institutions and organizations and historical properties which, in his judgment, are entitled thereto. [Acts 1949, ch. 110, § 1; 1949, ch. 237, § 1; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1967, ch. 364, § 1; 1967, ch. 369, § 1; 1968 (Adj. S.), ch. 531, § 1; 1973, ch. 263, § 1; 1975, ch. 125, § 1; 1975, ch. 270, § 1, 2; 1975, ch. 290, § 1; 1976 (Adj. S.), ch. 619, § 1; 1976 (Adj. S.), ch. 684, § 1; 1976 (Adj. S.), ch. 791, § 1; 1977, ch. 97, §§ 1, 2; 1977, ch. 125, 1; 1979, ch. 63, §§ 1-4; 1979, ch. 168, § 1.]

67-3015. *Computation on trade-ins.*—Where used articles are taken in trade, or in a series of trades, as a credit or part payment on the sale of new or used articles, the tax levied by this chapter shall be paid on the net difference, that is, the price of the new or used article sold less the credit for the used article taken in trade. [Acts 1947, ch. 3, subsec. 6; mod. C. Supp. 1950, § 1248.62 (Williams, § 1328.28).]

67-3016. *Collection from dealers.*—The aforesaid tax at the rate provided by law of the retail sales price, as of

the moment of sale, or of the cost price, as of the moment of purchase, as the case may be, shall be collectible from all persons, as defined in § 67-3002, engaged as dealers, as defined in § 67-3017, in the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of tangible personal property, or in the furnishings of any of the things or services taxable under this chapter. [Acts 1947, ch. 3, § 4; C. Supp. 1950, § 1248.53 (Williams, § 1328.25); Acts 1955, ch. 51, §§ 7, 9; 1971, ch. 117, § 3.]

67-3017. *“Dealer” defined.*—The term “dealer” is further defined to mean every person, as used in this chapter, who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state.

The term “dealer” is further defined to mean every person, as used in this chapter, who imports or causes to be imported, tangible personal property from any state or foreign country, for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state.

The term “dealer” is further defined to mean every person, as used in this chapter, who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein.

The term “dealer” is further defined to mean any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this chapter has been paid on the sale at re-

tail, the use, the consumption, the distribution, or the storage of said tangible personal property.

The term "dealer" is further defined to mean any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of said tangible personal property.

The term "dealer" is further defined to mean any person, as used in this chapter, who leases or rents tangible personal property, as defined in this chapter, for a consideration, permitting the use or possession of said property without transferring title thereto.

The term "dealer" is further defined to mean any person, as used in this chapter, who is the lessee or renter of tangible personal property, as defined in this chapter, and who pays to the owner of such property a consideration for the use or possession of such property without acquiring title thereto.

The term "dealer" is further defined to mean any person as used in this chapter, who maintains or has within this state, directly or by a subsidiary, an office, distributing house, sales room, or house, warehouse, or other place of business.

The term "dealer" is further defined to mean any person as defined in this chapter, who furnishes any of the things or services taxable under this chapter.

The term "dealer" is further defined to mean any person, as used in this chapter, who has any representa-

tive agent, salesman, canvasser or solicitor operating in this state, or any person who serves in such capacity, for the purpose of making sales or the taking of orders for sales, irrespective of whether such representative, agent, salesman, canvasser or solicitor is located here permanently or temporarily, and irrespective of whether an established place of business is maintained in this state.

The term "dealer" is further defined to mean and include any person, as used in this chapter, who distributes catalogues or other advertising matter and by reason thereof receives and accepts orders from residents of this state.

The term "dealer" is further defined to mean any person who uses tangible personal property, whether the title to such property is in him or some other entity, and whether or not such other entity is required to pay a sales or use tax, in the performance of his contract or to fulfill his contract obligations, unless such property has previously been subjected to a sales or use tax, and the tax due thereon has been paid. [Acts 1947, ch. 2, § 4; C. Supp. 1950, § 1248.53 (Williams, § 1328.25); Acts 1955, ch. 51, § 10; 1955, ch. 242, §§ 1, 8.]

67-3018. *Payment by dealer.*—Every "dealer" making sales, whether within or outside the state, of tangible personal property, for distribution, storage, use, or other consumption in this state, or furnishing any of the things or services taxable under this chapter, shall be liable for the tax imposed by this chapter. [Acts 1947, ch. 3, § 4; C. Supp. 1950, § 1248.54 (Williams, § 1328.25); Acts 1955, ch. 51, § 11; 1957, ch. 307, § 1; 1969, ch. 3, § 1.]

67-3019. [*Repealed.*]

Note. This section (Acts (Williams, § 1328.26)) was repealed by 1947, ch. 3, § 5; C. Supp. 1950, § 1248.60 Acts 1996, ch. 3, § 2.

67-3020. *Collection and payment by retailers.*—(a) The commissioner may by regulation provide that the amount collected by the retailer from the consumer in reimbursement of the tax be displayed separately from the list price, the price advertised in the premises, the marked price, or other price on the sale check or other proof of sale.

(b) When the tax collected for any period is in excess of that provided by law, the total tax collected shall be paid over to the commissioner, less any compensation allowed to the dealer as hereinafter set forth. This provision shall be construed with other provisions of this chapter and given effect so as to result in the payment to the commissioner of the total tax collected if in excess of that provided by law.

(c) Every dealer licensed to do business in the state of Tennessee who shall become delinquent for more than ninety (90) days in the payment of any sales or use taxes due the state after March 8, 1963, shall, upon notice from the commissioner, post with the commissioner cash or an indemnity bond with good and solvent surety, approved by him, in an amount equal to three (3) times the average monthly sales tax liability or use tax liability of said dealer, conditioned upon the proper payment of retail sales taxes or use taxes for which such dealer may become liable; provided, further, that in the event that any dealer who may become subject to the provisions of this sub-

section shall fail to post said cash or surety bond, said dealer shall be subject to revocation of any one (1) or more of the certificates of registration held by him as provided by § 67-3041. The bond provided for herein shall run for such time as may be determined by the commissioner.

(d) The tax hereby imposed shall be collected by the retailer from the consumer insofar as it can be done. [Acts 1947, ch. 3, § 5; C. Supp. 1950, § 1248.60 (Williams, § 1328.26); Acts 1955, ch. 51, § 7; ch. 307, § 2; 1963, ch. 89, § 1; 1969, ch. 3, § 3; 1970, (Adj. S.), ch. 402, § 1; 1971, ch. 117, § 4.]

67-3021. *Deduction for accounting expense.*—For the purpose of compensating the dealer in accounting for and remitting the tax levied on and after July 1, 1980, by this chapter, a dealer shall be allowed a deduction of tax due, reported, and paid to the department as follows:

(1) 2 percent (2%) of the first \$2,000 on each report, and

(2) 1½% of amounts over \$2,000 on each report.

Beginning July 1, 1985, and thereafter, for the purpose of compensating the dealer in accounting for and remitting the tax levied by this chapter, a dealer shall be allowed a deduction of tax due, reported, and paid to the department of 2 percent (2%) on each report.

No deduction from tax shall be allowed if any such report or payment of tax is delinquent.

Provided, however, when delinquency of the amount due is caused by the destruction by fire or other casualty of the dealer's place of business or business records, such

dealer shall be allowed the two percent (2%) deduction from the amount of tax due as authorized in this section. [Acts 1947, ch. 3, § 8; C. Supp. 1950, § 1248.65 (Williams, § 1328.30); 1980, ch. 594, §§ 1, 2, 3; 1980, ch. 871, § 3.]

NOTE: Destruction by fire provision retroactive to 1/1 '78 and repealed effective 4/18/80.

67-3022. *Monthly returns and payment.*—The taxes levied hereunder shall be due and payable monthly, on the first day of each month, and for the purpose of ascertaining the amount of tax payable under this chapter it shall be the duty of all dealers on or before the 20th day of each month to transmit to the commissioner, upon forms prescribed, prepared and furnished by him, returns, showing the gross sales, or purchases, as the case may be, arising from all sales or purchases taxable under this chapter during the preceding calendar month. [Acts 1947, ch. 3, § 8; C. Supp. 1950, § 1248.64 (Williams, § 1328.30; modified).]

67-3023. *Payment of tax with return.*—At the time of transmitting the return required hereunder to the commissioner the dealer shall remit to him therewith the amount of tax due under the applicable provisions of this chapter and failure to so remit such tax shall cause said tax to become delinquent. [Acts 1947, ch. 3, § 10; C. Supp. 1950, § 1248.75 (Williams, § 1328.32).]

67-3024. *Payment of tax on rentals or furnishing of things or services.*—Gross proceeds from rentals or leases of tangible personal property shall be reported and the tax shall be paid with respect thereto in accordance with such rules and regulations as the commissioner may prescribe.

It is declared to be the intention of this chapter to impose a tax on the gross proceeds of all leases and rentals of tangible personal property in the state where the lease or rental is a part of the regularly established business, or the same is incidental or germane thereto.

Gross proceeds from the furnishing of things or services taxable under this chapter shall be reported and the tax shall be paid with respect thereto in the same manner as gross proceeds from the sale, rental or lease of tangible personal property and in accordance with such rules and regulations as the commissioner may prescribe. [Acts 1947, ch. 3, § 8; C. Supp. 1950, § 1248.64 (Williams, § 1328.30); Acts 1955, ch. 51, § 12.]

67-3025. *Settlement of tax on quitting business—Collection of tax from debtor or dealer.*—(a) If any dealer liable for any tax, interest or penalty levied hereunder shall sell out his business or stock of goods, or shall quit the business, he shall make a final return and payment within fifteen (15) days after the date of selling or quitting the business. His successor, successors, or assigns, if any, shall withhold sufficient of the purchase money to cover the amount of such taxes, interest, and penalties due and unpaid until such former owner shall produce a receipt from the commissioner showing that they have been paid, or a certificate stating that no taxes, interest, or penalties are due. If the purchaser of a business or stock of goods shall fail to withhold the purchase money as above provided, he shall be personally liable for the payment of the taxes, interest, and penalties accruing and unpaid on account of the operation of the business by any former owner, owners, or assigns.

(b) In the event any dealer is delinquent in the payment of the tax herein provided for the commissioner may give notice of the amount of such delinquency by registered mail to all persons having in their possession or under their control any credits or other personal property belonging to such dealer, or owing any debts to such dealer at the time of receipt by them of such notice, and thereafter any person so notified shall neither transfer nor make any other dispositions of such credits, other personal property, or debts, until the commissioner shall have consented to a transfer or disposition, or until thirty (30) days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five (5) days after receipt of such notice, advise the commissioner of any and all such credits, other personal property, or debts, in their possession, under their control, or owing by them, as the case may be.

(c) Any violation of the provisions of this section shall be a misdemeanor and punishable as such. [Acts 1947, ch. 3, § 7; C. Supp. 1950, § 1248.63 (Williams, § 1328.29).]

67-3026. *Interest and penalties for delinquency—Extension of time for making return—Establishment of filing dates.*—When any dealer shall fail to make any return and pay the full amount of the tax required by this chapter there shall be imposed, in addition to other penalties provided herein, a specific penalty to be added to the tax in the amount of five percent (5%), if the failure is for not more than thirty (30) days with an additional five percent (5%), for each additional thirty (30) days, or fraction thereof, during which the failure continues, not to exceed twenty-five percent (25%) in the aggregate. In

the case of a false or fraudulent return, where willful intent exists to defraud the state of any tax due under this chapter, a specific penalty of fifty percent (50%) of the tax shall be assessed. Provided, however, where a return is delinquent at the time it is filed or becomes delinquent, the minimum penalty may be five dollars (\$5.00), regardless of the amount of tax due or whether there is any tax due.

When an examination of a dealer's books and records indicates that the dealer is deficient in paying the proper tax due for a month, but has paid more tax than is actually due for another month, or is deficient in paying the proper tax on one or more transactions within a month, but has paid more tax than is actually due on other transactions during the same month, or has erroneously paid tax to another dealer, the overpayment or erroneous payment shall be applied to the deficiency before computing any penalty and interest due as a result of such examination, the earliest overpayments offsetting the earliest underpayments for this purpose, and the penalty, if any, being computed on the amounts of underpayments not offset by overpayments.

All penalties and interest imposed by this chapter shall be payable to and collectible by the commissioner in the same manner as if they were a part of the tax imposed.

The commissioner is specifically authorized to establish by regulation periodic filing and payment dates other than monthly in those instances where the commissioner deems it to be in the best interests of the state to do so; provided, however, that in such cases where the average monthly liability is or is indicated to be more than one hundred dollars (\$100), the commissioner shall require

advance deposits in such amounts as the commissioner deems necessary to protect the state's interest.

The commissioner for good cause may extend for not to exceed thirty (30) days the time for making any returns required under the provisions of this chapter. [Acts 1947, ch. 3, § 8; 1949, ch. 245, § 3; C. Supp. 1950, § 1248.66 (Williams, § 1328.30); Acts 1965, ch. 4, § 1; 1969, ch. 164, §§ 1, 2; 1970 (Adj. S.), ch. 360, § 1; 1977, ch. 64, § 1, 1980, ch. 885, § 13.]

NOTE: Effective July 1, 1980, interest rate is provided for in section 67-112, TCA.

67-3027. *Form of payment.*—All taxes, interest, and penalties imposed under this chapter shall be paid to the commissioner at Nashville in the form of remittance required by him. [Acts 1947, ch. 3, § 10; C. Supp. 1950, § 1248.76 (Williams, § 1328.32).]

67-3028. *Credit for sales returns and allowances.*—In the event purchases are returned to the dealer by the purchaser or consumer after the tax imposed by this chapter has been collected, or charged to the account of the consumer or user, the dealer shall be entitled to reimbursement of the amount of tax so collected or charged by him, in the manner prescribed by the commissioner; and in case the tax has not been remitted by the dealer to the commissioner, the dealer may deduct the same in submitting his return upon receipt of a signed statement of the dealer as to the gross amount of such refunds during the period covered by said signed statement, which period shall not be longer than ninety (90) days. In the event a dealer shall sell any article of personal property on a security agreement or other title retained instrument and such

dealer shall thereafter be required to repossess or enforce his lien on said article of personal property at a time when the balance due on the unpaid purchase price shall exceed five hundred dollars (\$500), such dealer shall be entitled to a credit on the sales tax which he shall be required to collect and remit to the commissioner in an amount equal to the difference between the amount of the sales tax collected and paid at the time of the original purchase and the amount of sales tax which would be owed on that portion of the purchase price which has actually been paid by the purchaser, plus the sales tax on the first five hundred dollars (\$500) of the unpaid balance of the purchase price. The commissioner shall issue to the dealer an official credit memorandum equal to the net amount remitted by the dealer for such tax collected. Such memorandum shall be accepted by the commissioner at full face value from the dealer to whom it is issued, in the remittance for subsequent taxes accrued under the provisions of this chapter, provided that in cases where a dealer has retired from business and has filed a final return, a refund of tax may be made if it can be established to the satisfaction of the commissioner that the tax was not due.

A dealer who has paid the tax imposed by this chapter on any sale as defined in § 67-3002 may take credit in any return filed under the provisions of this chapter for the tax paid by him on the unpaid balance due on accounts which during the period covered by the current return have been found to be worthless and are actually charged off for federal income tax purposes, provided, that if any accounts so charged off are thereafter in whole or in part paid to the dealer, the amount so paid shall be included in the first return filed after such collection and the tax

paid accordingly. [Acts 1947, ch. 3, § 13; C. Supp. 1950, § 1248.82 (Williams, § 1328.35); Acts 1965, ch. 358, § 1; 1974 (Adj. S.), ch. 798, § 1.]

67-3029. *Estimate by commissioner of tax due.*—In the event any dealer fails to make a report and pay the tax as provided by this chapter, or in case any dealer make a grossly incorrect report, or a report that is false or fraudulent it shall be the duty of the commissioner to make an estimate for the taxable period of retail sales of such dealer, or of the gross proceeds for rentals or leases of tangible personal property by the dealer, estimating the cost price of all articles of tangible personal property imported by the dealer for use or consumption or distribution or storage to be used or consumed in this state, and assess and collect the tax and interest, plus penalty, if such have accrued, on the basis of such assessment, which shall be considered prima facie correct, and the burden to show the contrary shall rest upon the dealer. However, if the dealer can show by reasonable proof that he has paid any Tennessee Sales or Use Tax to a vendor on personal property or taxable service which such dealer has subsequently sold without collecting tax on the resale of said personal property or taxable service, then the dealer shall be given credit for any such payment in computing any liability to the Department of Revenue for Sales or Use Tax. Reasonable proof can be supplied by invoices and other records which the dealer may obtain from the vendors from which he has made purchases. [Acts 1947, ch. 3, § 8; C. Supp. 1950, § 1248.67 (Williams, § 1328.30); Acts 1965, ch. 285, § 1.]

67-3030. *Examination of books and assessment in absence of dealer's return.*—(a) If any dealer subject to

make and file a return required by any provision of this chapter fails to render such return within the time required or renders a return which is false or fraudulent in that it contains statements which differ from the true gross sales, purchases, leases, or rentals taxable under this chapter or otherwise fails to comply with the provisions of this chapter for the taxable period for which said return is made, the commissioner shall give such dealer ten (10) days' notice in writing requiring such dealer to appear before him or his assistant with such books, records, and papers as he may require relating to the business of such dealer for such taxable period; and said commissioner may require such dealer or the agents and employees of such dealer to give testimony or to answer interrogatories under oath administered by the commissioner or his assistants respecting the sale at retail, the use, consumption, or distribution, or storage for use or consumption in this state or lease or rental of tangible personal property subject to tax or the failure to make report thereof as provided in this chapter.

(b) If any dealer fails to make any such return or refuses to permit an examination of his, the dealer's books, records or papers, or to appeal and answer questions within the scope of such investigation relating to the sale, use, consumption, distribution, storage, lease, or rental of tangible personal property, the commissioner is authorized to make an assessment based upon such information as may be available to him and to issue a distress warrant for the collection of any such taxes, interest or penalties found to be due. Any such assessment shall be deemed prima facie correct. [Acts 1947, ch. 3, § 10; C. Supp. 1950, § 1248.74 (Williams, § 1328.32.)]

67-3031. *Assessment of use tax by commissioner.*—In the event the dealer has imported the tangible personal property and he fails to produce an invoice showing the cost price of the articles as defined in this chapter, which are subject to tax, or the invoice does not reflect the true or actual cost price as defined herein, then the commissioner shall ascertain, in any manner feasible, the true cost price, and assess and collect the tax with interest plus penalties, if such have accrued on the true cost price as assessed by him; the assessment so made shall be considered prima facie correct, and the duty shall be on the dealer to show the contrary. ([Acts 1947, ch. 3, § 8; C. Supp. 1950, § 1248.69 (Williams, § 1328.30.)])

67-3032. *Value of rental fixed by commissioner.*—In the case of the lease or rental of tangible personal property, if the consideration given or reported by the dealer does not, in the judgment of the commissioner, represent the true or actual consideration, then the commissioner is authorized to fix the same and collect the tax thereon in the same manner as above provided, with interest plus penalties, if such have accrued. [Acts 1947, ch. 3, § 8; C. Supp. 1950, § 1248.70 (Williams, § 1328.30.)]

67.3033. *Delinquency—Distress warrants—Collection of erroneous payments—Injunction—Lien—Recording.*—The tax imposed by this chapter shall for each month become delinquent on the twenty-first (21st), day of each succeeding month.

The commissioner of revenue is empowered and it shall be his duty when any tax becomes delinquent under this chapter to issue a distress warrant for the collection of the tax, interest, and penalty from each delinquent tax-

payer. Said distress warrant may be addressed and delivered to the sheriff of the county wherein such delinquent taxpayer resides, or has his principal office or place of business, or to the sheriff of any county in which the commissioner has reason to believe property of such delinquent taxpayer may be found.

The sheriff into whose hands such warrant may come, or his deputy, may execute same by the distraint and sale of personal property belonging to such taxpayer and the proceedings in respect thereto shall be the same as are provided by law for proceedings under an execution at law from a court of record; and the executing officer shall be entitled to the same fees, commissions, and necessary expense of removing and keeping property distrained as in case of an execution from a court of record.

If the officer cannot find any personal property to satisfy said distress warrant, he may levy same upon any real estate in his county belonging to such delinquent taxpayer; and if levied on land, said distress warrant together with the officer's return thereon shall be returned to the circuit court of the county wherein the land lies and the land shall be condemned and sold under the orders of said circuit court in the same manner as in case of the levy on land of an execution issued by a justice of the peace.

Upon any claim of illegal assessment and collection the taxpayer shall have his remedy under §§ 67-2303-67-2312, and also shall be allowed to file claims for refund in the manner authorized by the general law.

Distress warrants issued for the collection of the tax imposed by this chapter may, in the discretion of the com-

missioner of revenue, be addressed and delivered to an employee or representative of the department of revenue for purposes of execution, and such employee or representative shall have the same powers and authority as a sheriff for the purposes of levying and executing any distress warrants so issued. Such employee or representative shall be entitled to the same fees and costs as would accrue to a sheriff for such services, which fees and costs shall be paid to the department of revenue and deposited in the general fund of the state treasury.

The commissioner may, in his discretion, require any dealer who has been found in default under this chapter, to execute and file with the department a good-faith bond, with surety approved by the commissioner, in an amount double the defaulted liability, which bond shall be kept on file with the department and remain in effect such period of time after such default as may be required by the commissioner.

The commissioner, with the approval of the attorney-general, may file and maintain injunctive proceedings against any dealer who is delinquent or in default under this chapter to enjoin such dealer from doing business during such delinquency or default.

The tax herein levied shall be a lien upon all the property of the dealer against whom the same is assessed located in this state and shall be inferior only to state and county ad valorem taxes and to existing liens created by contracts, but it shall be superior to any renewals of existing contract liens; provided, however, that it shall be the responsibility of the department of revenue to file and have recorded a notice of such lien in the office of the

county register of deeds in the county or counties where such property is located, and it shall be the duty of the county register to record notice of such lien in the same manner as other liens are filed in his office; such tax lien shall not be superior to any recorded lien except those subsequently placed of record. There shall be no fees collected by the county register at the time the notice of such a lien is recorded but he shall extend credit to the department of revenue for such recording fees as are chargeable and submit his bill at the end of each month to the director of the division submitting such notice of lien for recordation in order to obtain payment. [Acts 1947, ch. 3, § 11; C. Supp. 1950, § 1248.78 (Williams, § 1328.33); Acts 1955, ch. 242, § 5; impl. am. Acts 1959, ch. 9, § 14; Acts 1971, ch. 285, § 2.]

67-3034. *Records kept by dealers.*—It shall be the duty of every dealer required to make a report and pay any tax under this chapter, to keep and preserve suitable records of the sales or purchases, as the case may be, taxable under this chapter, and such other books of account as may be necessary to determine the amount of tax due hereunder, and other information as may be required by the commissioner, and it shall be the duty of every such dealer, moreover, to keep and preserve, for a period of three (3) years, all invoices and other records of goods, wares and merchandise, or other subjects of taxation under this chapter; and all such books, invoices, and other records shall be open to examinations at all reasonable hours to the commissioner or any of his authorized agents. [Acts 1947, ch. 3, § 8; C. Supp. 1950, § 1248.68 (Williams, § 1328.30); Acts 1955, ch. 242, § 2.]

67-3035. *Contents of dealer's records—Penalty for violations.*—Each dealer, as defined in this chapter, shall

secure, maintain, and keep for a period of three (3) years a complete record of tangible personal property received, used, sold at retail, distributed or stored, leased or rented within this state by said dealer together with invoices, bills of lading, and other pertinent records and papers as may be required by the commissioner for the reasonable administration of this chapter, and all such records shall be open for inspection to the commissioner at all reasonable hours. Any dealer subject to the provisions of this chapter who shall violate these provisions shall be guilty of a misdemeanor and upon conviction shall be punished as provided by the general law. [Acts 1947, ch. 3, § 9; C. Supp. 1950, § 1248.73 (Williams, § 1328.31); Acts 1955, ch. 242, § 4.]

67-3036. *Records kept by wholesalers and jobbers.*— In order to aid in the administration and enforcement of the provisions of this chapter, and collect all of the tax imposed by this chapter, all wholesale dealers and jobbers in this state are required to keep a record of all sales of tangible personal property made in this state, whether such sales be for cash or on terms of credit. The record required to be kept by all wholesale dealers and jobbers shall contain and include the name and address of the purchaser, the date of the purchase, the article purchased, and the price at which the article is sold to the purchaser. These records shall be kept for a period of three (3) years and shall be open to the inspection of the commissioner, or his duly authorized assistants, at all reasonable hours. The failure of any wholesale dealer or jobber in this state to keep such records, or the failure of any wholesale dealer or jobber in this state to permit an inspection of such records by the commissioner as aforesaid, shall be deemed a misdemeanor and upon conviction thereof the wholesale

dealer or jobber shall be subject to a fine of not less than fifty dollars (\$50.00) nor more than two hundred dollars (\$200), or imprisonment in the county jail for not less than ten (10) days nor more than thirty (30) days, or both, for the first offense, and for the second or each subsequent offense the penalty shall be double. [Acts 1947, ch. 3, § 8; C. Supp. 1950, § 1248.71 (Williams, § 1328.30); Acts 1955, ch. 242, § 3.]

67-3037. *Access to records of carriers.*—For the purpose of enforcing the collection of the tax levied by this chapter the commissioner is specifically authorized and empowered to examine at all reasonable hours the books, records, and other documents of all transportation companies, agencies or firms that conduct their business by truck, rail, water, airplane, or otherwise, in order to determine what dealers, as provided in this chapter, are importing or otherwise shipping articles of tangible personal property which are liable for said tax. In the event said transportation company, agency or firm shall refuse to permit such examination of its books, records, and other documents by the commissioner, as aforesaid, it shall be deemed guilty of a misdemeanor punishable by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500); provided further, that the commissioner shall have the right to proceed in the chancery court for a mandatory injunction or other appropriate remedy to enforce his right, as granted by this section, to an examination of the books and records of transportation companies. [Acts 1947, ch. 3, § 9; C. Supp. 1950, § 1248.72 (Williams, § 1328.31).]

67-3038. *Importation permits.*—In order to prevent the illegal importation of tangible personal property which

is subject to tax in this state, and to strengthen and make more effective the manner and method of enforcing payment of the tax imposed by this chapter, the commissioner is authorized and empowered to put into operation a system of permits whereby any person or dealer as defined in this chapter may import tangible personal property by truck, automobile, or other means of transportation other than a common carrier, without having said truck, automobile, or other means of transportation seized and subjected to legal proceedings for its forfeiture. Such system of permits shall require the person or dealer who desires to import tangible personal property into this state which property is subject to tax imposed by this chapter, to apply to the commissioner or his assistant for a permit stating the kind of vehicle to be used, the name of the driver, the license number of the vehicle, the kind or character of tangible personal property to be imported, the date, the name and address of the consignee and such other information as the commissioner may deem proper or necessary to prevent the illegal transportation of tangible personal property into this state. Such permit shall be free of cost to the applicant and may be obtained from the department of finance and taxation or any of its branch offices. [Acts 1947, ch. 3, § 12; C. Supp. 1950, § 1248.79 (Williams, § 1328.34).]

67-3039. *Importation without permit prohibited.*—The importation into this state of tangible personal property which is subject to tax, by truck, automobile or other means of transportation other than a common carrier, without having first obtained a permit as described hereinbefore (if the tax imposed by this chapter on the said tangible personal property has not been paid), shall be

construed as an attempt to evade payment of the said tax and the same is prohibited and the said truck, automobile or means of transportation other than a common carrier, and said taxable property may be seized by the commissioner in order to secure the same as evidence in a trial and the same shall be subject to forfeiture and sale in the manner provided for in this chapter. [Acts 1947, ch. 3, § 12; C. Supp. 1950, § 1248.80 (Williams, § 1328.34).]

67-3040. *Confiscation of vehicle used in illegal importation.*—Any truck, automobile, or other means of transportation other than a common carrier which is used to import into this state tangible personal property which is subject to tax under this chapter, together with the contents thereof, is declared to be contraband and subject to confiscation unless a permit as hereinabove described was first obtained. The commissioner shall confiscate any such truck, automobile, or other means of transportation other than a common carrier together with its contents whenever the same is found to be importing without permit tangible personal property, the sale or use of which is taxable under this chapter.

Upon seizure for confiscation the commissioner or his representatives shall appraise the value of the vehicle and its contents according to his best judgment and shall deliver to the person, if any, found in possession of such property, a receipt showing the fact of seizure, from whom seized, the place of seizure, a description of the vehicle and contents seized. A copy of said receipt shall be filed in the office of the department of finance and taxation and shall be open to public inspection.

The commissioner or any representative of the department of finance and taxation shall within five (5) days ad-

vertise the said vehicle and its contents or other property so seized for sale to the highest bidder by one (1) proper notice in a newspaper published in the county where the property is to be sold, if the county has such newspaper; if no newspaper, then by notice on the courthouse door at least five (5) days prior to the date of sale, containing a description of the vehicle and property to be sold.

Any person claiming any property so seized as contraband goods may, at any time before the sale, file with the commissioner at Nashville a claim in writing requesting a hearing and stating his interest in the articles seized. The commissioner shall set a date for hearing within ten (10) days from the day the claim is filed. The commissioner is empowered to subpoena witnesses and compel their attendance at the hearing authorized under this chapter. All parties to the proceeding including the person claiming such property shall have the right to have subpoenas issued by the commissioner to compel the attendance of all witnesses deemed by such parties to be necessary for a full and complete hearing. All witnesses shall be entitled to the witness fees and mileage provided by law for legal witnesses, which fees and mileage shall be paid as a part of the cost of the proceeding.

In the event the ruling of the commissioner is favorable to the claimant the commissioner shall deliver to the claimant the vehicle or property so seized. If the ruling of the commissioner is adverse to the claimant the commissioner shall proceed to sell such contraband goods in accordance with the foregoing provisions of this chapter. The expense of storage, transportation, etc., shall be adjudged as a part of the cost of the proceeding in such manner as the commissioner shall fix pending and proceed-

ing to recover a vehicle or other property seized under this chapter. The commissioner may order delivery thereof to any claimant who shall establish his right to immediate possession thereof and who shall execute with one (1) or more sureties, approved by the commissioner, and deliver to the commissioner a bond in favor of the state of Tennessee for the payment of a sum double the appraised value thereof as of the time of the hearing; and containing the further provision that if the vehicle or other property is not returned at the time of the hearing the bond shall stand in lieu of and be forfeited in the same manner as such vehicle or other property.

The action of the commissioner may be reviewed by a petition for common law writ of certiorari addressed to the circuit court of Davidson county, which petition shall be filed within ten (10) days from the date the order of the commissioner is made.

Immediately upon the granting of the writ of certiorari the commissioner shall cause to be made, certified, and forwarded to said court a complete transcript of the proceeding in said cause which shall contain all the proofs submitted before the commissioner. All defendants named in the petition desiring to make defense shall answer or otherwise plead to said petition within ten (10) days from the date of the filing of said transcript unless the time be extended by the court.

Said decision of the commisioner shall be reviewed by the circuit court solely upon the pleadings, and a transcript of the evidence before the commissioner and neither party shall be entitled to introduce any additional evidence in the circuit court. The confiscated vehicle or goods shall

not be sold pending such review but shall be stored by the commissioner until the final disposition of said case.

Within the discretion of the commissioner the claimant may be awarded possession of the confiscated goods pending the decision of the circuit court under the petition for certiorari, provided the claimant shall be required to execute a bond payable to the state of Tennessee in an amount double the value of the property seized, the sureties to be approved by the commissioner. The condition of the bond shall be that the obligors shall pay to the state the full value of the vehicle or goods seized unless upon certiorari the decision of the commissioner shall be reversed and the property awarded to the claimant.

If no claim is interposed, such vehicle or other goods shall be forfeited without further proceedings and the same sold as hereinabove provided. The above procedure is the sole remedy of any claimant and no court shall have jurisdiction to interfere therewith by replevin, injunction, supersedeas, or in any other manner.

Any funds derived from the sale of confiscated vehicles or other goods shall be distributed or allocated in the same manner as other funds derived from this chapter. [Acts 1947, ch. 3 § 12; C. Supp. 1950, § 1248.81 (Williams, § 1328.34).]

67-3041. *Registration of sellers—Recall of certificate—Certiorari.*—Every person desiring to engage in or conduct business as a dealer in this state shall file with the commissioner an application for a “certificate of registration” for each place of business. Every application for a certificate of registration shall be made upon a form prescribed by the commissioner and shall set forth the name

under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the commissioner may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority.

When the required application has been made the commissioner shall issue to each applicant a separate certificate of registration for each place of business within the state; provided, however, no certificate of registration shall be issued to any person who has been engaged in business in this state, and who has not made a complete return and payment as provided for in § 67-3025, or who is delinquent in the payment of any sales or use tax due the state. A certificate of registration is not assignable and is valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall at all times be conspicuously displayed at the place for which issued.

Provided, further, that the commissioner may refuse to issue any such registration certificate for any place of business where there is reasonable cause to believe there exists a continuity of business enterprise or resumption of a discontinued one involving a transfer of a business and/or a stock of goods in the same or a different location between members of a family, between relatives by blood or marriage, between employer and employee, or former employee, from a partnership or proprietorship to a corporation, or vice versa, where all or some of the per-

sons involved are the same, or that there otherwise exists a conspiracy to defeat the enforcement of this chapter, in the event the transferor is delinquent in the payment of the payment of the tax herein provided. Such refusal may be continued until such time as the transferor shall have complied with the requirements of § 67-3025 hereof and with all pertinent provisions of this chapter and rules and regulations of the commissioner promulgated hereunder or until full and complete explanatory information requested by the commissioner has been furnished. Any person aggrieved by such refusal or by the denial of a certificate for reasons stated in the preceding paragraph may, within ten (10) days after written notice thereof has been mailed or delivered to him, apply to the commissioner for a hearing setting forth in such application a full statement of the grounds on which he intends to rely; provided, that he has filed with the commissioner, at the time of making such application, a surety company bond running to the state in such sum as the commissioner may determine to be appropriate under the circumstances, conditioned upon the payment of all taxes then due and to become due during the pendency of such appeal to the commissioner and during any further judicial appeal. When such bond is filed the commissioner shall immediately issue such registration certificate. After such hearing the commissioner shall give written notice of his decision. In the event of an adverse determination by the commissioner under the provisions of this or the preceding paragraph an appeal therefrom may be made to any court having jurisdiction within ten (10) days after such written notice has been mailed or delivered to him.

When any person to whom a "certificate of registration" has been issued under this chapter leases certain departments in his place of business to other persons for the purpose of making sales at retail of tangible personal property or taxable services to consumers and keeps the records and makes and accounts for the collection of the leased department's sales, he may include the sales made by such leased departments in his own tax return and remit the tax due thereon. Provided, however, that in such instances a lessor shall be deemed to be an agent of the lessee and the lessee shall not be relieved of any of his liabilities under this chapter if the lessor defaults therein.

Whenever any person fails to comply with any provision of this chapter or any rule or regulation of the commissioner relating thereto, the commissioner, upon hearing, after giving the person ten (10) days' notice in writing, specifying the time and place of a hearing and requiring him to show cause why his certificate of registration should not be revoked, may revoke or suspend any one (1) or more of the certificates of registration held by the person. The notice may be served personally or by certified mail directed to the last known address of the person. The commissioner may designate a hearing officer from the department of revenue to conduct the hearings provided for in this section, who shall make findings of fact, conclusions of law, and proposed orders based thereon. If the commissioner concurs, he shall issue the order; or he may, upon review of the record, make such findings, conclusions, and issue such orders as, in his discretion, the record justifies.

Any person who engages in business as a dealer in this state without a certificate of registration after a certificate

of registration has been suspended or revoked, and each officer of any corporation which so engages in business shall be guilty of a misdemeanor and punishable as provided by the general law.

It shall be a misdemeanor, and punishable as such, for any person having a certificate of registration to use the same for the purpose of purchasing tangible personal property subject to the tax herein levied except for resale, unless authorized so to do by other provisions of this chapter and the rules and regulations adopted pursuant thereto.

Provided further, that it shall be a misdemeanor for any person who has a certificate of registration to use or consume any tangible personal property purchased or otherwise acquired under said certificate of registration and subject to the privilege taxes herein levied, without paying said privilege taxes.

Provided further, that any person violating these provisions shall forfeit the certificate of registration which shall be revoked in accordance with the provisions of this chapter, and such person shall not be entitled to register under this chapter for a period of twelve (12) months after said revocation shall have become final.

Any person who engages in the business of furnishing any of the things or services taxable under this chapter shall likewise apply for and obtain a certificate of registration as provided by this section.

The commissioner may, in his discretion, on the basis of adequate past experience, recall any certificate of registration where, in his judgment, the cost of administering the account is disproportionately high as compared to the

amount of tax which a taxpayer is remitting or will remit. Such recall shall be reviewable by a petition for a common law writ of certiorari in the chancery court of Davidson County, which petition shall be filed within ten (10) days from the date of such recall.

It shall be a misdemeanor for any dealer as herein defined to engage in business without a proper and valid certificate of registration. [Acts 1947, ch. 3, § 16; C. Supp. 1950, § 1248.88 (Williams, § 1328.38); Acts 1951, ch. 168, § 1; 1955, ch. 51, § 14; 1955, ch. 242, § 9; 1961, ch. 136, § 1; 1963, ch. 92, § 1; 1969, ch. 109, § 1; 1971, ch. 55, § 1; 1971, ch. 92, § 1; 1971, ch. 186, § 1.]

67-3042. *Penalties for violations by dealers.*—(a) Any dealer subject to the provisions of this chapter failing or refusing to furnish any return herein required to be made or failing or refusing to furnish a supplemental return or other data required by the commissioner, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding two hundred dollars (\$200) or be imprisoned in the county jail not exceeding sixty (60) days, or shall be punished by both fine and imprisonment in the discretion of the court for any such offense.

(b) Any dealer required to make, render, sign, or verify any return as aforesaid who makes a false or fraudulent return with intent to evade the tax hereby levied shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars (\$100) nor more than three hundred dollars (\$300) or be imprisoned in the county jail not less than thirty (30) days nor more than three (3) months, or shall be punished by both fine and imprisonment in the discretion of the court.

(c) Any dealer who shall violate any other provision of this chapter, punishment for which is not otherwise herein provided, shall be guilty of a misdemeanor and upon conviction thereof shall be fined in the sum of not less than ten dollars (\$10.00), nor more than one hundred dollars (\$100) or imprisoned in the county jail for a period of not less than ten (10) days nor more than thirty (30) days or both fine and imprisonment at the discretion of the court. For a second or subsequent offense the penalty shall be double. [Acts 1947, ch. 3, § 10; C. Supp. 1950, § 1248.77 (Williams, § 1328.32).]

67-3043. *Forms furnished by commissioner.*—The commissioner shall design, prepare, print and furnish to all dealers, or make available to said dealers, all necessary forms for filing returns and instructions to insure a full collection from dealers and an accounting for the taxes due, but failure of any dealer to secure such forms shall not relieve such dealer from the payment of said tax at the time and in the manner herein provided. [Acts 1947, ch. 3, § 13; C. Supp. 1950, § 1248.83 (Williams, § 1328.35).]

67-3044. *Administration of oaths.*—The commissioner and his assistants are authorized and empowered to administer the oath for the purpose of enforcing and administering the provisions of this chapter. [Acts 1947, ch. 3, § 13; C. Supp. 1950, § 1248.84 (Williams, § 1328.35).]

67-3045. *Rules and regulations.*—The commissioner shall have the power to make and publish reasonable rules and regulations not inconsistent with this chapter or the other laws, or the Constitution of this state or the United States, for the enforcement of the provisions of this chap-

ter and the collection of revenues hereunder. [Acts 1947, ch. 3, § 13; C. Supp. 1950, § 1248.85 (Williams, § 1328.35).]

67-3046. *Administrative costs—Rules concerning application of rate.*—(a) The cost of preparing and distributing the reports, forms, and paraphernalia for the collection of said tax and the inspection and enforcement duties required herein shall be borne by the revenues produced by this chapter, provisions for which are hereinafter made.

(b) The commissioner shall administer and enforce the assessment and collection of the taxes and penalties imposed by this chapter. He is authorized to make and publish such rules and regulations not inconsistent with this chapter as he may deem necessary in enforcing its provisions in order that there shall not be collected on the average more than the rate levied herein. The commissioner is authorized to and he shall provide by rule and regulation a method for accomplishing this end, and he shall prepare instructions to dealers by setting out to them suitable brackets of prices for applying the tax or any other method that may be necessary for the purpose of the enforcement of this chapter and the collection of the tax imposed thereby. The use of tokens is forbidden and prohibited.

The commissioner is granted the power and authority to employ all necessary personnel and to purchase such supplies and equipment as may be necessary and incur any other necessary expenses as are proper for the enforcement and administration of this chapter. [Acts 1947, ch. 3, § 14; C. Supp. 1950, § 1248.86 (Williams, § 1328.36).]

67-3047. *Deposit and allocation of receipts.*—The commissioner shall deposit promptly to the credit of the state treasurer in state depositories all moneys received by him under the provisions of this chapter, and all such moneys shall be earmarked and allocated as follows:

Three ninths ($\frac{3}{9}$) of such moneys shall be earmarked and allocated specifically and exclusively to the general fund; two ninths ($\frac{2}{9}$) of such moneys shall be earmarked and allocated specifically and exclusively to educational purposes; and four ninths ($\frac{4}{9}$) of such moneys shall be earmarked and allocated specifically and exclusively to the following objects and purposes:

(1) Twelve and one-half percent ($12\frac{1}{2}\%$) is appropriated to the several incorporated municipalities within the state of Tennessee to be allocated and distributed to them monthly by the commissioner of finance and administration in the proportion as the population of each municipality bears to the aggregate population of all municipalities within the state according to the latest federal census and other censuses authorized by law. Municipalities incorporated subsequent to the last decennial federal census shall, until the next decennial federal census, be eligible for an allotment, commencing on July 1, following incorporation, election and installation of officials, on the population basis determined under regulations of the state planning office and certified by that officer to the commissioner of finance and administration, provided an accurate census of population has been certified to the state planning office by the municipality. Municipalities now participating in allocation shall continue to do so on the basis of their population determined according to law.

A municipality having a population of twenty-five hundred (2,500) or more persons, according to the federal census of 1970 or any subsequent federal census, in which at least forty percent (40%) of the assessed valuation (as shown by the tax assessment rolls or books of the municipality) of the real estate in the municipality consists of hotels, motels, tourist courts accommodation, tourist shops and restaurants, shall be defined as a "premiere type tourist resort" for purposes of this chapter. As an alternative to and in lieu of the allocation prescribed in the first paragraph of subsection (1), a premiere type tourist resort may elect to receive twelve and one-half percent (12.5%) of four ninths ($\frac{4}{9}$) of the tax actually collected and remitted by dealers within the boundaries of such resort. Any distribution made to a premiere type tourist resort pursuant to such election shall be earmarked and paid from the general fund. If, however, any such payment is made to a premiere type tourist resort pursuant to the election, the amount which would have been received by such resort had the resort not exercised the election shall be earmarked and allocated to the general fund.

Also, any municipality shall have the right to take not more than two (2) special censuses as its own expense at any time during the interim between the regular decennial federal census. Such right shall include the current decennium. Any such census shall be taken by the federal bureau of the census, or in a manner directed by and satisfactory to the Tennessee state planning office. The population of the municipality shall be revised in accordance with the special census for purposes of distribution of such funds, effective on the first day of the

next July, beginning July 1, 1958, following the certification of the census results by the federal bureau of the census or the state planning office to the commissioner of finance and administration; the aggregate population shall likewise be adjusted in accordance with any such special census, effective the same date as aforesaid.

Provided, that any other such special census of the entire municipality taken in the same manner provided herein, under any other law, shall be used for the distribution of such funds, and in that case, no additional special census shall be taken under the provisions of this section.

Before distributing moneys to incorporated municipalities from the sales tax, as provided for herein, the commissioner of finance and administration shall make a deduction therefrom monthly of the sum of forty-two thousand four hundred and seventeen dollars (\$42,417) per month of the twelve and one-half percent ($12\frac{1}{2}\%$) of sales tax collections allocated to incorporated municipalities, which sum together with an appropriation per annum from the general fund of the state shall be apportioned and transmitted to the University of Tennessee for use by the university in establishing and operating a municipal technical advisory service in its institute for public service, and shall be used for studies and research in municipal government, publications, educational conferences and attendance there at and in furnishing technical, consultative and field services to municipalities in problems relating to fiscal administration, accounting, tax assessment and collection, law enforcement, improvements and public works, and in any and all matters relating to municipal government. This program shall be carried on in cooperation with and with the advice of cities and

towns in the state acting through the Tennessee municipal league and its executive committee, which is recognized as their official agency or instrumentality.

(2) Eighty percent (80%) shall be used for education and shall be subject to appropriation, allocation, and allotment for that purpose.

(3) Four percent (4%) is allocated to the general fund.

(4) One percent (1%), or so much thereof as may be required, is appropriated to the department of revenue in addition to its regular appropriation to be expended by it in the administration and enforcement of this chapter; and

(5) Two and one-half percent ($2\frac{1}{2}\%$) is appropriated to the sinking fund account to be used by the state funding board for the payment of interest and principal becoming due on state bonds issued by the state of Tennessee.

In event the one and one half percent ($1\frac{1}{2}\%$) heretofore appropriated to the sinking fund board should prove to be insufficient to pay the principal and interest on state bonds heretofore issued to which five percent (5%) of the proceeds of the Tennessee retailers' sales tax up to twenty million dollars (\$20,000,000) and seven and one-half percent ($7\frac{1}{2}\%$) of proceeds in excess of twenty million dollars (\$20,000,000) have been pledged, then and in that event such additional amount of the gross proceeds of the sales tax as may be necessary to pay in full the principal and interest on such bonds is hereby pledged for the payment of the principal and interest on such bonds, and the

proceeds of the tax shall be used for that purpose before any distribution is made for any of the other purposes hereinabove specified. [Acts 1947, ch. 3, § 15; 1947, ch. 149, § 1; 1949, ch. 17, § 1; 1949, ch. 248, § 1; 1949, ch. 261, § 1; C. Supp., 1950, § 1248.87 (Williams, §§ 1328.37, 1328.37a); Acts 1951, ch. 241, § 1; 1953, ch. 50, § 1; 1953, ch. 195, § 1; modified; 1955, ch. 51, § 13; 1955, ch. 190, § 1; 1957, ch. 130, § 1; 1957, ch. 136, § 1; 1957, ch. 363, § 1; impl. am. Acts 1959, ch. 9, §§ 3, 14; Acts 1959, ch. 67, § 1; 1959, ch. 276, § 1; impl. am. Acts 1961, ch. 97, § 3; Acts 1961, ch. 187, § 1; 1963, ch. 276, § 1; 1965, ch. 281, § 1; 1967, ch. 315, § 1; 1969, ch. 172, § 1; 1970 (Adj. S.), ch. 430, § 1; 1971, ch. 117, § 5; impl. am. 1972 (Adj. S.), ch. 542, §§ 1-3, 15; 1972 (Adj. S.), ch. 589, § 1; 1973, ch. 232, § 1; 1974 (Adj. S.), ch. 494, § 1; 1974 (Adj. S.), ch. 516, § 2; 1974 (Adj. S.), ch. 593, § 1; 1975, ch. 197, § 1; 1976 (Adj. S.), ch. 466, § 4; 1977, ch. 6, §§ 1, 2; 1977, ch. 41, § 1; 1979, ch. 114, § 1; 1979, ch. 364, § 1.]

67-3048. *Implementation of chapter.*—The commissioner with the approval of the governor is authorized to employ all necessary assistance to administer this chapter properly and is also authorized to purchase all necessary supplies and equipment which may be required for this purpose, in order to put the chapter fully and completely into effect.

All necessary expenses of employees to administer this chapter shall be paid in the manner provided by law applicable to expenses of other state officials and employees.

The commissioner is authorized to require the assistance of any official of the state or of any political subdivision thereof in the administration of this chapter and

it shall be unlawful for any official of this state or of any political subdivision thereof to accept an application for a certificate of title to a motor vehicle as provided for in chapters 1 through 6 of Title 59 or for a certificate of registration for a vessel as provided for in chapter 22 of Title 70 unless the applicant shall present evidence that a sales or use tax, as provided for in this chapter, has been paid on the sales price of the vehicle or vessel by such applicant or such applicant has authority from the commissioner of revenue to file an application for such certificate of title or registration without the payment of the sales or use tax. It shall also be unlawful for any official referred to herein to accept an application for a certificate of title to a motor vehicle when the sale of such vehicle constitutes an occasional and isolated sale which is taxable under Section 67-3002(i) unless the applicant presents a bill of sale which evidences the sale price and also presents evidence that the sales or use tax has been paid on that amount, or in the absence of such a bill of sale, unless the said official requires evidence of payment of the sales or use tax on the fair market value of the vehicle as the same is determined by him by reference to the most recent issue of an authoritative automotive pricing manual, such as the N.A.D.A. Official Used Car Guide, Southeastern Edition. [Acts 1947, ch. 3, § 17; mod. C. Supp. 1950, § 1248.89 (Williams, § 1328.39); 1971, ch. 117, § 6; 1976, ch. 789, § 1.]

Section 2. The "1963 Local Option Revenue Act"
(§§ 67-3049—67-3056)

SECTION.	SECTION.
67-3049. Local option revenue act—Title.	67-3052. Distribution of proceeds.
67-3050. Local governments authorized to levy privilege tax.	67-3053. Election on resolution.
67-3051. Counties to have priority over cities —Rate determination.	67-3054. Collection and administration.
	67-3055. Repeal of local tax.
	67-3056. Relationship to other taxes.

67-3049. *Local option revenue act—Title.*—Sections 67-3049—67-3056 shall be known and may be cited as the "1963 Local Option Revenue Act." [Acts 1963, ch. 329, § 1.]

67-3050. *Local governments authorized to levy privilege tax.*—Any county by resolution of its county legislative body or any incorporated city or town by ordinance of its governing body is authorized to levy a tax on the same privileges subject to the "Retailers' Sales Tax Act" under this chapter as the same may be amended, which are exercised within such county, city or town, to be levied and collected in the same manner and on all such privileges but not to exceed one half ($\frac{1}{2}$) of the rates levied therein until June 30, 1981 and thereafter not to exceed three fourths ($\frac{3}{4}$) of the rates levied therein, provided that the tax so levied shall not exceed five dollars (\$5.00) on the sale or use of any single article of personal property whenever the rate of the tax does not exceed one percent (1%) of the rates levied therein, nor more than seven and one half dollars (\$7.50) whenever the rate of the tax exceeds one percent (1%) of the rates levied therein; provided, how-

ever, that no county or incorporated city or town is authorized to levy any tax on the sale, purchase, use, consumption or distribution of electric power or energy, or of natural or artificial gas, or coal and fuel oil; provided further that the operation of such resolution or ordinance shall be subject to approval of the voters as required in 67-3053 and to the other provisions of §§ 67-3049—67-3056.

Notwithstanding other provisions of this chapter, with respect to industrial and farm machinery as defined in § 67-3002, subparagraphs (n) and (p), and with respect to water sold to or used by manufacturers at the state tax rate of one percent (1%) as authorized in § 67-3003(g), the local tax thereon shall be imposed at the rate of one third of one percent (.33 $\frac{1}{3}$ %) whenever the rate of the local tax does not exceed one percent (1%) and at the rate of one half of one percent (.5%) whenever the rate of the local tax exceeds one percent (1%). The maximum local tax on the sale or use of any single article of industrial or farm machinery shall be as provided hereinabove.

Nothing herein contained shall be deemed to permit an increase in the privilege tax hereby authorized, without the ratification thereof in the manner provided in § 67-3053, regardless of the nature of any previous call and regardless of future action of the general assembly regarding the levy of the tax authorized by the Retailers' Sales Tax Act under chapter 30 of title 67. [Acts 1963, ch. 329, § 2; 1968 (Adj. S.), ch. 488, §§ 1, 4; 1971, ch. 117, § 7; 1971, ch. 148, § 1; 1972 (Adj. S.), ch. 653, § 2; 1973, ch. 239, § 2; 1973, ch. 340, § 1; 1974 (Adj. S.), ch. 675, § 2; 1975, ch. 316, § 2; 1976 (Adj. S.), ch. 466, § 5; 1977, ch. 43, § 1; 1977, ch. 178, § 2; 1978 (Adj. S.), ch. 592, § 2; impl. am.

Acts 1978 (Adj. S.), ch. 934, §§ 7, 36; 1979, ch. 308, § 3; 1980, ch. 886, § 2.]

67-3051. *Counties to have priority over cities—Rate determination.*—The levy of the tax by a county shall preclude, to the extent of the county tax, any city or town within such county from levying the tax, but a city or town shall at any time have the right to levy the tax at a rate equal to the difference between the county tax and the maximum rate authorized herein. For Cities and Towns having territory in more than one County, the term 'cities and towns' is defined as that part of their territory in which they are not precluded by a County tax.

If an ordinance levying the tax herein authorized is adopted by a city or town prior to adoption of the tax by the county in which the city or town is located, the effectiveness of the ordinance shall be suspended for a period of forty (40) days beyond the date on which it would otherwise be effective under the charter of the city or town. If during this forty-day period, the quarterly county court adopts a resolution to levy the tax at least equal to the rate provided in such ordinance, the effectiveness of the ordinance shall be further suspended until it is determined whether the county tax is to be operative, as provided, in § 67-3053. If the county tax becomes operative by approval of the voters as provided in § 67-3053, the ordinance shall be null and void, but if the county tax does not become operative the ordinance shall become effective on the same date that the county tax is determined to be non-operative, and the election required by § 67-3053 shall be held. After initial adoption of the tax by a county or a city or town therein, the tax rate may be increased by a city, town or

county under the same procedure. If the tax levied by a quarterly county court is finally determined to be non-operative, such action shall not preclude subsequent action by the county to adopt the tax at a rate at least equal to the city or town tax rate, in which event the city or town tax shall cease to be effective; provided, however, that the city or town shall receive from the county tax the same amounts as would have been received from the city or town tax until the end of the current fiscal year of the city or town. [Acts 1963, ch. 329, § 3; 1968, ch. 488, § 2.]

67-3052. *Distribution of proceeds.*—The tax levied by a county under §§ 67-3049—67-3056 shall be distributed as follows:

(1) One-half ($\frac{1}{2}$) of the proceeds shall be expended and distributed in the same manner as the county property tax for school purposes is expended and distributed.

(2) The other half ($\frac{1}{2}$) shall be distributed as follows:

(a) Collections for privileges exercised in unincorporated areas, to such fund or funds of the county as the governing body of the county shall direct.

(b) Collections for privileges exercised in incorporated cities and towns, to the city or town in which the privilege is exercised.

(c) Provided, however, that a county and city or town may by contract provide for other distribution of the half ($\frac{1}{2}$) not allocated to school purposes. [Acts 1963, ch. 329, § 4; 1967, ch. 90, § 1.]

67-3053. *Election on resolution.*—(a) Any ordinance or resolution of a county or of a city or town levying the

tax under authority of §§ 67-3049—67-3056 shall not become operative until approved in an election herein provided in the county, or the city or town, as the case may be. The county election commission shall hold an election thereon, providing options to vote "FOR" or "AGAINST" the ordinance or resolution, within sixty (60) days after the receipt of a certified copy of such ordinance or resolution, and a majority vote of those voting in the election shall determine whether the ordinance or resolution is to be operative. If the majority vote is for the ordinance or resolution, it shall be deemed to be operative on the date that the county election commission makes its official canvass of the election returns. Provided, however, that no tax shall be collected under any such ordinance or resolution until the first day of a month occurring at least thirty (30) days after the operative date.

Notwithstanding any provisions of this chapter to the contrary, a county court or the governing body of any incorporated city or town may authorize, by resolution or ordinance, the state to collect a local sales tax previously authorized and approved pursuant to the provisions of this chapter. Such authorization by any county court or by the governing body of any incorporated city or town shall be fully effective without necessity of a referendum on such resolution; provided, however that no tax shall be collected under any such authorization until the first day of a month occurring at least thirty (30) days after receipt of a certified copy of such resolution or ordinance by the commissioner of revenue.

(b) If a quarterly county court adopts a resolution to levy the tax at the same rate that is operative in a city

or town in the county, the election under this section to determine whether the county tax is to be operative shall be open only to the voters residing outside of such city or town. If the county tax is at a higher rate than the rate of the city or town tax, the election shall be also open to the voters of the city or town. Provided further, that should any county or city or town hold an election hereunder, and the ordinance or resolution is rejected, no other election thereon shall be held by such county, city or town for a period of six (6) months from the date of the holding of such prior election, except that in those counties of the state having a population of not more than seven hundred fifty thousand (750,000) nor less than seven hundred thousand (700,000) and not more than two hundred seventy-eight thousand (278,000) and not less than two hundred fifty thousand (250,000) according to the federal census of 1970 or any subsequent federal census, in case of rejection, the limitation period on subsequent elections shall be one (1) year from the date of the holding of such prior election.

(c) A resolution or ordinance levying the tax authorized may be initiated by petition of the voters in the following manner. The petition shall be addressed to the quarterly county court or the governing body of the city or town requesting that a resolution or ordinance be adopted levying the tax and shall state the rate of the tax, whether the tax is to be collected by the county, city or town, or by the department of revenue of the state, and shall specify the officer against whom suit for the recovery of any tax illegally assessed or collected shall be brought. The petition shall be signed by at least a number of registered voters in the taxing jurisdiction equal to ten per-

cent (10%) of the total number of registered voters in the taxing jurisdiction on the date the petition is filed. Provided, a petition requesting a resolution of the quarterly county court may not be signed by a registered voter in a city or town where a tax herein authorized is operative equal to that levied by the resolution, and the registered voters therein shall not be considered in arriving at the required percentage. A petition requesting a resolution shall be filed with the county court clerk, a petition requesting an ordinance with the chief clerical officer of the city or town, and a photographic copy of the petition shall be filed at the same time with the county commissioners of elections who shall be the judges of the sufficiency of the petition. If within thirty (30) days from the filing of a petition a resolution or ordinance is not adopted as requested and a certified copy filed with the commissioners of elections, the petition shall constitute a resolution or ordinance, and the commissioners of elections shall hold an election thereon as in paragraph (a) above. [Acts 1963, ch. 329, § 5; 1967, ch. 113, § 1; 1968 (Adj. S.), ch. 488, § 3; 1971, ch. 83, § 1; 1972 (Adj. S.), ch. 455, § 1.]

67-3054. *Collection and administration.*—In collecting and administering the tax levied under the authority of §§ 67-3049—67-3056 counties, cities and towns shall have all the powers which the commissioner of revenue has in collecting and administering the state sales tax. Rules and regulations promulgated by the commissioner of revenue may be adopted by reference, and penalties and interest for delinquencies imposed equal to the rates provided in § 67-3026. When so provided in the resolution or ordinance of adoption, the department of revenue of the state of Tennessee shall collect such tax concurrently with the col-

lection of the state tax in the same manner as the state tax is collected, provided that said department has determined that such collection of said tax is feasible, and has promulgated rules and regulations governing such collection. The department shall remit the proceeds of the tax to the county, city or town levying the tax, less a reasonable amount of percentage as determined by the department to cover the expenses of administration and collection. The county, city or town shall furnish a certified copy of the adopting resolution or ordinance to the department of revenue in accordance with regulations prescribed by the department. Upon any claim of illegal assessment and collection, the taxpayer shall have the remedy provided in § 67-3033, it being the intention of the legislature that the provisions of law which apply to the recovery of state taxes illegally assessed and collected be conformed to apply to the recovery of taxes illegally assessed and collected under the authority of §§ 67-3049 - 67-3056. Notice of any tax paid under protest shall be given to the county court or the governing body of the city or town. The resolution or ordinance levying the tax shall designate the county or municipal officer against whom suit may be brought for recovery in the event the tax is collected by the department of revenue. [Acts 1963, ch. 329, § 6.]

67-3055. *Repeal of local tax.*—Any ordinance or resolution of a county, city or town adopted in accordance with §§ 67-3049—67-3056 may be repealed in the same manner as provided herein for its adoption; provided, that any election for the repeal of a county tax shall be open to the voters of the entire county. [Acts 1963, ch. 329, § 7.]

67-3056. *Relationship to other taxes.*—The tax authorized by §§ 67-3049—67-3056 is and shall be in addition to all other taxes which counties, cities and towns are now authorized to levy, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to all other fees and taxes now authorized to be levied. [Acts 1963, ch. 329, § 8.]

TENNESSEE SALES & USE TAX LAWS—1983 REPLACEMENT

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Former Sections	1983 Replacements	Former Sections	1983 Replacements
67-2621	67-2-121	67-2733	67-4-813
67-2622	67-2-114	67-2801—67-2814	R '63, ch.
67-2623	67-2-115		194, § 6; 1976
67-2624	67-2-101		(Adj. S.), ch.
67-2625	67-2-115		537, § 56; 1983,
67-2626	67-2-116		ch. 189, § 1
67-2627	67-2-120	67-2901	67-4-901
67-2628	67-2-115	67-2902	67-4-903
67-2629	67-2-120	67-2903	67-4-904
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67-2633	67-2-119	67-2909	67-4-907
67-2634	67-2-113	67-2910	67-4-908
67-2635 (1st para.)	67-2-121	67-2911	67-4-909
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67-2701	67-4-801	67-2918	67-4-911
67-2702	67-4-806, 67-4-807	67-2919	67-4-912
67-2703	67-4-804	67-2920	67-4-913
67-2704	67-4-805	67-2921	67-4-914
67-2705	67-4-802	67-2922	67-4-915
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67-2709—67-2713	67-4-810	67-2925	67-4-918
67-2714—67,2722	67-4-811	67-2926	Obsolete
67-2723	67-4-812	67-2927	Obsolete
67-2724	67-4-814	67-3001	67-6-101
67-2725	67-4-815	67-3002	67-6-102
67-2726	67-4-816	67-3003 (1st para.)	67-6-201
67-2727	67-4-803	67-3003(a)	67-6-202
67-2728	67-4-817,	(b)	67-6-203
	67-4-820	(c), (d)	67-6-204
67-2729	67-4-819	(e)	67-6-205
67-2730	67-4-818	(f)	67-6-501
67-2731	Obsolete	(g)	67-6-206
67-2732	Obsolete	(h)	67-6-207
		(i)	67-6-208

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Former Sections	1983 Replacements	Former Sections	1983 Replacements
67-3004(a)-(e)	67-6-209	(c)	67-6-522
(f)	67-6-308	(d)	67-6-502
67-3005	67-6-210	67-3021	67-6-509
67-3006	Obsolete	67-3022—67-3024	67-6-504
67-3007	67-6-211, 67-6-313	(1st and	
67-3008	67-6-507	3rd para.)	
67-3009	67-6-101	67-3024 (2nd para.)	67-6-204
67-3010	67-6-323	67-3025(a), (c)	67-6-513
67-3011	67-6-301	(b), (c)	67-6-518
67-3012		67-3026(a)-(c)	67-6-516
(1)	67-6-329	(d)	67-6-505
(2)	67-6-325	67-3026(e)	67-6-506
(3)	67-6-326	67-3027	67-6-512
(4)	67-6-324	67-3028 (1st and	
(5)	67-6-305	2nd para.)	67-6-507
(6)	67-6-315	(3rd para.)	67-6-508
(7)	67-6-302	67-3029 (1st para.)	67-6-517
(8)(a)	67-6-321	(2nd para.)	67-6-507
(8)(b)	67-6-327	67-3030—67-3032	67-6-517
(9)	67-6-320	67-3033 (1st para.)	67-6-515
(10)	67-6-316	(2nd-4th,	
(11)	67-6-306	6 para.)	67-6-520
(12)	67-6-318	(5th para.)	67-6-527
(13)	67-6-303	(7th para.)	67-6-522
(14)	67-6-319	(8th para.)	67-6-521
(15)	Obsolete	(9th para.)	67-6-519
(16)	67-6-304	67-3034—67-3037	67-6-523
(17)	67-6-310	67-3038, 67-3039	67-6-524
(18)	67-6-312	67-3040	67-6-525
(19)	67-6-314	67-3041 (1st-3rd para.)	67-6-602
(20)	67-6-311	(4th para.)	67-6-511
(21)	67-6-328	(5th para.)	67-6-604
(22)	67-6-317	(6th and	
(23)	67-6-307	12th para.)	67-6-606
67-3013	67-6-309	(7th and	
67-3014	67-6-322	8th para.)	67-6-607
67-3015	67-6-510	(9th para.)	67-6-603
67-3016	67-6-501	(10th para.)	67-6-601
67-3017	67-6-102	(11th para.)	67-6-605
67-3018	67-6-501	67-3042	67-6-526
67-3019	R '69, ch. 3, § 2	67-3043	67-6-403
67-3020(a)	67-6-503	67-3044	67-6-404
(b)	67-6-514	67-3045	67-6-402

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Former Sections	1983 Replacements	Former Sections	1983 Replacements
67-3046(a)	67-6-403	67-3123	67-4-1020, 67-4-1021
(b) (1st para.)	67-6-401,	67-3124	67-4-1025
	67-6-402, 67-6-512	67-3125	67-4-1008
(b) (2nd para.)	67-6-405	67-3126	67-4-1014
67-3047	67-6-103	67-3127	67-4-1023
67-3048 (1st and		67-3201	60-3-101
2nd para.)	67-6-402	67-3202	60-3-102
(3rd para.)	67-6-406	67-3203	60-3-103
67-3049	67-6-701	67-3204	60-3-104
67-3050(a)	67-6-702, 67-6-704,	67-3205	60-3-105
	67-6-705	67-3206	60-3-106
(b)	67-6-702	67-3208	60-3-107
(c)	67-6-705	67-3209	60-3-108
(d)	67-6-705, 67-6-708	67-3210	60-3-109
67-3051	67-6-703	67-3211	60-3-110
67-3052	67-6-712	67-3212	60-3-111
67-3053(a)	67-6-706, 67-6-711	67-3213	60-3-112
(b)	67-6-706	67-3214	60-3-113
(c)	67-6-707	67-3215	60-3-114
67-3054	67-6-710	67-3216—67-3225	R '78 (Adj.
67-3055	67-6-709		S.), ch. 761,
67-3056	67-6-701		§ 116
67-3101	67-4-1001	67-3301	67-3-601
67-3102	67-4-1002, 67-4-1004,	67-3302	67-3-602
	67-4-1005, 67-4-1009,	67-3303	67-3-603
	67-4-1025	67-3304	67-3-604
67-3103	67-4-1003	67-3305	67-3-605
67-3104	67-4-1006	67-3306	67-3-606
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67-3106	67-4-1009	67-3308	67-3-608
67-3107	67-4-1007	67-3309	67-3-609
67-3108	67-4-1010	67-3310	67-3-610
67-3109	67-4-1011	67-3311	67-3-611
67-3110	67-4-1001, 67-4-1022	67-3312	67-3-612
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67-3120	67-4-1018	67-3402	67-3-702
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67-3122	67-4-1024	(b)	67-3-703, 67-3-704

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Former Sections	1983 Replacements	Former Sections	1983 Replacements
(c)	67-3-705		
(d)	67-3-706	67-3408	67-3-710
67-3404	67-3-703	67-3409—67-3412	R '78 (Adj.
67-3405	67-3-707		S.), ch. 761, § 116
67-3406	67-3-708	67-3501	67-3-101
67-3407	67-3-709	67-3502	67-3-102

CHAPTER 6

SALES AND USE TAXES

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PART I—GENERAL PROVISIONS

67-6-101. *Short title—Nature of tax.*—This chapter shall be known as the “Retailers’ Sales Tax Act” and the tax imposed by this chapter shall be in addition to all other privilege taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to all other fees and taxes levied. [Acts 1947, ch. 3, §§ 1, 3; C. Supp. 1950, §§ 1248.50, 1248.52 (Williams, §§ 1328.22, 1328.24); T.C.A. (orig. ed.), §§ 67-3001, 67-3009.]

67-6-102. *Definitions.*—The following words, terms, and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except when the context clearly indicates a different meaning:

(1) “Business” includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit, or advantage, either direct or in-

direct. "Business" shall not be construed to include occasional and isolated sales or transactions by a person who does not hold himself out as engaged in business, or the occasional and isolated sale at retail or use of services sold by or purchased from a person not regularly engaged in business as a vendor of taxable services or from one who is such a vendor but is not normally a vendor with respect to the services sold or purchased in such occasional or isolated transaction. Provided, however, that it shall be construed to include occasional and isolated sales or transactions by such a person involving aircraft, vessels or motor vehicles, (which terms shall be construed to include trailers and special motor equipment sold in conjunction therewith), as defined by and required to be registered under the laws of Tennessee with an agency of this state or under the laws of the United States with an agency of the federal government, unless such sales or transactions are otherwise exempt under this chapter or are sales between persons who are: married, lineal relatives or spouses of lineal relatives, or siblings. Such sales or transactions involving aircraft based in this state shall be presumed to be made and taxable in this state; and any registration reflecting such aircraft which are so based shall constitute evidence thereof. Provided further, however, that it shall not be construed to include those occasional or isolated sales or transactions by such a person involving mobile homes or house trailers, as defined by § 55-4-111, when the consummation of such exclusively involves the assumption by the purchaser of a previously existing finance contract and no other consideration is received by the seller;

(2) "Commissioner" means and includes the commissioner of revenue of the state of Tennessee, or his duly authorized assistants;

(3) "Cost price" means the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor, or service costs, transportation charges, or any expenses whatsoever;

(4) "Dealer" means every person, as used in this chapter, who:

(A) Manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state;

(B) Imports or causes to be imported, tangible personal property from any state or foreign country, for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state;

(C) Sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein;

(D) Has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of the tangible personal property;

(E) Leases or rents tangible personal property, as defined in this chapter, for a consideration, permitting the use or possession of the property without transferring title thereto;

(F) Is the lessee or renter of tangible personal property, as defined in this chapter, and who pays to the owner of such property a consideration for the

use or possession of such property without acquiring title thereto;

(G) Maintains or has within this state, directly or by a subsidiary, an office, distributing house, sales room, or house, warehouse, or other place of business;

(H) Furnishes any of the things or services taxable under this chapter;

(I) Has any representative, agent, salesman, canvasser or solicitor operating in this state, or any person who serves in such capacity, for the purpose of making sales or the taking of orders for sales, irrespective of whether such representative, agent, salesman, canvasser or solicitor is located here permanently or temporarily, and irrespective of whether an established place of business is maintained in this state;

(J) Distributes catalogues or other advertising matter and by reason thereof receives and accepts orders from residents of this state; and

(K) Uses tangible personal property, whether the title to such property is in him or some other entity, and whether or not such other entity is required to pay a sales or use tax, in the performance of his contract or to fulfill his contract obligations, unless such property has previously been subjected to a sales or use tax, and the tax due thereon has been paid;

(5) "Fabricating or processing tangible personal property for resale" means only tangible personal property which is fabricated or processed for ultimate use or consumption off the premises of the one engaging in such fabricating or processing;

(6) "Farm equipment and machinery" means any appliance used directly and principally for the purpose of producing agricultural products, including nursery pro-

ducts, for sale and use or consumption off the premises, the retail price of which, for any such single article, exceeds two hundred and fifty dollars (\$250), but shall not include an automobile, truck, household appliances or property which becomes real property when erected or installed. Notwithstanding the foregoing provisions, grain bins and attachments thereto which are sold to or used by a farmer shall be considered "farm equipment and machinery";

(7) "Gross sales" means the sum total of all retail sales of tangible personal property and all proceeds of services taxable under this chapter as defined herein, without any deduction whatsoever of any kind or character, except as provided in this chapter;

(8) "Industrial machinery" means:

(A) Machinery, including repair parts and any necessary repair or taxable installation labor therefor, which is directly and primarily utilized in fabricating or processing tangible personal property for resale, or equipment primarily used for air pollution control or stream pollution control, where the use of such machinery or equipment is by one who engages in such fabrication or processing as his principal business either within or without this state, or such use by a county or municipality or a contractor pursuant to a contract with such county or municipality for use in stream pollution control or sewage systems; and

(B) Machinery, the cost of which, for any such single article, exceeds one thousand dollars (\$1,000), which is directly and primarily utilized for the purpose of remanufacturing industrial machinery as defined in subdivision (8)(A) when such utilization is by one whose principal business is that of remanufacturing industrial machinery;

(9) "Lease or rental" means the leasing or renting of tangible personal property and the possession or use thereof by the lessee or renter for a consideration, without transfer of the title of such property;

(10) "Livestock and poultry feed" means and includes all grains, minerals, salts, proteins, fats, fibers and all vitamins, acids and drugs used and mixed with said ingredients as a growth stimulant, disease preventive, to stimulate feed conversion and make a complete feed;

(11) "Persons" includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, any governmental agency whose services are essentially a private commercial concern, or other group or combination acting as a unit, in the plural as well as the singular number. It is further defined to include any political subdivision or governmental agency, including electric membership corporations or cooperatives, and utility districts, to the extent that such agency sells at retail, rents or furnishes any of the things or services taxable under this chapter;

(12) "Retailer" means and includes every person engaged in the business of making sales at retail, or for distribution, or use, or consumption, or storage to be used or consumed in this state or furnishing any of the things or services taxable under this chapter;

(13)(A) "Retail sales" or a "sale at retail" means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, and shall mean and include all such transactions as the commissioner of revenue upon investigation finds to be in lieu of sales; provided that sales for resale must be in strict compliance with rules

and regulations. Any dealer making a sale for resale which is not in strict compliance with rules and regulations shall himself be liable for and pay the tax;

(B) "Retail sale" or "sale at retail" shall include the furnishing of things or services taxable under this chapter;

(C) "Retail sale" or "sale at retail" includes the delivery in this state of tangible personal property by a retailer who has no place of business in this state, if the delivery is made to a consumer in this state or to another person for redelivery to a consumer in this state pursuant to a retail sale made by such retailer to such consumer;

(D) Nothing in this subdivision (13)(D) or subdivision (13)(C) shall be construed to impose a tax which is invalid either under the commerce clause or the due process clause of the United States Constitution. In addition, the department of revenue may enter into a reciprocal agreement with the comparable department of another state to furnish records concerning purchases made by citizens of the other state from a dealer in this state where the dealer collects neither a sales nor a use tax on such sales provided that the other state agrees to furnish the same records to this state and each sale is in excess of five hundred dollars (\$500). Provided further, all dealers in Tennessee making sales to purchasers in another state where no sales or use tax is collected shall furnish the department copies of all such invoices or suitable substitutes for sales in excess of five hundred dollars (\$500) with their monthly returns provided that the department notifies such dealers of the existence of a reciprocal agreement;

(E) "Sale at retail," "use," "storage," and "consumption" shall not include the sale, use, storage or consumption of industrial materials and explosives for future processing, manufacture or conversion into articles of tangible personal property for resale where

such industrial materials and explosives become a component part of the finished product or are used directly in fabricating, dislodging, sizing, converting, or processing such materials or parts thereof, and such terms shall not include materials, containers, labels, sacks, bags or bottles used for packaging tangible personal property when such property is either sold therein directly to the consumer or when such use is incidental to the sale of such property for resale;

(F) "Retail sale," "sale at retail," and "retail sales price" shall include the following services:

(i) The sale, rental or charges for any rooms, lodgings, or accommodations furnished to transients by any hotel, inn, tourist court, tourist camp, tourist cabin, motel, or any place in which rooms, lodgings or accommodations are furnished to transients for a consideration. The tax shall not apply, however, to rooms, lodgings, or accommodations supplied to the same person for a period of ninety (90) continuous days or more;

(ii) Charges for services rendered by persons operating or conducting a garage, parking lot or other place of business for the purpose of parking or storing motor vehicles. The tax shall not apply, however, to charges for such services made by the state and its political subdivisions when providing on-street parking space for which charges are collected or when operating or conducting a garage or parking lot which is unattended and such charges are collected by parking meters;

(iii) The furnishing of telephone service to regular subscribers, such service embracing local (flat charge or metered) calls, long-distance calls, leased lines or equipment for the vocal or written transmission of messages, as well as any additional or incidental services for which a charge is made; and the transmission for a consideration of messages by telegraph;

(iv) The performing for a consideration of any repair services with respect to any kind of tangible personal property;

(v) The laundering or dry cleaning of any kind of tangible personal property, excluding coin-operated laundry, dry-cleaning or car-wash facilities, where a charge is made therefor;

(vi) The installing of tangible personal property with remains tangible personal property after installation where a charge is made for such installation whether or not such installation is made as an incident to the sale thereof and whether or not any tangible personal property is transferred in conjunction with such installation service; and

(vii) The enriching of uranium materials, compounds, or products, which is performed on a cost-plus basis or on a "toll enrichment fee" basis;

(14)(A) "Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication work, and the furnishing, repairing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property.

(B) "Sale" shall also mean such transfer of customized or packaged computer software, which is defined to mean, information and directions loaded into a computer which dictate different functions to be performed by the computer, whether contained on tapes, discs, cards, or other device material. For such purpose, computer software shall be considered tangible personal property, however, the fabrication of software by a person for his own use on consumption

shall not be considered a taxable "use" under subdivision (18) of this section or any other section of this chapter.

(C) A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price shall be deemed a sale; provided, however, that where title to property is taken by an industrial development corporation (within the meaning of chapter 53 of title 7), but the property is leased to a taxpayer, the transaction shall be regarded for purposes of this chapter, as a sale to and purchase by the industrial development corporation followed by a lease, regardless of whether the lessee has an option to purchase any or all of the property from the industrial development corporation.

(D) "Sale" includes the furnishing of any of the things or services taxable under this chapter;

(15) "Sales price" means the total amount for which tangible personal property is sold, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, losses, or any other expense whatsoever; provided, that cash discounts allowed and taken on sales shall not be included; provided, that the term "sales price" shall not include any additional consideration given by the purchaser for the privilege of making deferred payments regardless of whether such additional consideration shall be known as interest, time price differential on conditional sales contracts, carrying charges or any other name by which it shall be known;

(16) "Storage" means and includes any keeping or retention in this state of tangible personal property for use or consumption in this state, or for any purpose other than sale at retail in the regular course of business;

(17) "Tangible personal property" means and includes personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. "Tangible personal property" shall not include stocks, bonds, notes, insurance, or other obligations or securities;

(18) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business; and

(19) "Use tax" referred to in this chapter includes the "use," the "consumption," the "distribution," and the "storage" as herein defined. [Acts 1947, ch. 3, §§ 2, 4; C. Supp. 1950, §§ 1248.51, 1248.53 (Williams, §§ 1328.23, 1328.25); Acts 1951, ch. 3, § 1; modified; 1955, ch. 51, §§ 1-5, 10; 1955, ch. 242, §§ 1, 8; impl. am. Acts 1959, ch. 9, § 14; Acts 1959, ch. 15, § 1; 1963, ch. 38, §§ 1, 2, 7; 1963, ch. 172, §§ 1, 2; 1965, ch. 3, § 1; 1965, ch. 335, § 1; 1968 (Adj. S.), ch. 556, § 1; 1968 (Adj. S.), ch. 601, § 1; 1969, ch. 95, § 1; 1970 (Adj. S.), ch. 390, § 1; 1971, ch. 117, § 1; 1971, ch. 149, § 1; ch. 151, § 1; 1972 (Adj. S.), ch. 528, § 1; 1972 (Adj. S.), ch. 709, § 1; 1972 (Adj. S.), ch. 731, § 1; 1972 (Adj. S.), ch. 757, § 1; 1972 (Adj. S.), ch. 769, § 1; 1973, ch. 179, § 1; 1974 (Adj. S.), ch. 778, § 1; 1976 (Adj. S.), ch. 442, § 1; 1977, ch. 42, § 1; 1977, ch. 250, § 1; 1978 (Adj. S.), ch. 565, §§ 1, 2; 1978 (Adj. S.), ch. 789, §§ 1, 2;

1978 (Adj. S.), ch. 921, § 1; 1979, ch. 352, § 1; 1980 (Adj. S.), ch. 602, § 1; 1981, ch. 229, § 1; T.C.A. (orig. ed.), §§ 67-3002, 67-3017.]

67-6-103. *Deposit and allocation of receipts.*—The commissioner shall deposit promptly to the credit of the state treasurer in state depositories all moneys received by him under the provisions of this chapter, and all such moneys shall be earmarked and allocated as follows:

(1) Three ninths (3/9) of such moneys shall be earmarked and allocated specifically and exclusively to the general fund;

(2) Two ninths (2/9) of such moneys shall be earmarked and allocated specifically and exclusively to educational purposes; and

(3) Four-ninths (4/9) of such moneys shall be earmarked and allocated specifically and exclusively to the following objects and purposes:

(A)(i) Twelve and one-half percent (12½) is appropriated to the several incorporated municipalities within the state of Tennessee to be allocated and distributed to them monthly by the commissioner of finance and administration in the proportion as the population of each municipality bears to the aggregate population of all municipalities within the state according to the latest federal census and other censuses authorized by law. Municipalities incorporated subsequent to the last decennial federal census shall, until the next decennial federal census, be eligible for an allotment, commencing on July 1, following incorporation, election and installation of officials, on the population basis determined under regulations of the state planning office and certified by that officer to the commissioner of finance and administration, pro-

vided an accurate census of population has been certified to the state planning office by the municipality. Municipalities now participating in allocation shall continue to do so on the basis of their population determined according to law;

(ii) A municipality having a population of twenty-five hundred (2,500) or more persons, according to the federal census of 1970 or any subsequent federal census, in which at least forty percent (40%) of the assessed valuation (as shown by the tax assessment rolls or books of the municipality) of the real estate in the municipality consists of hotels, motels, tourist courts accommodation, tourist shops and restaurants, shall be defined as a "premiere type tourist resort" for purposes of this chapter. As an alternative to and in lieu of the allocation prescribed in subdivision (3)(A)(i), a premiere type tourist resort may elect to receive twelve and one-half percent ($12\frac{1}{2}\%$) of four ninths ($\frac{4}{9}$) of the tax actually collected and remitted by dealers within the boundaries of such resort. Any distribution made to a premiere type tourist resort pursuant to such election shall be earmarked and paid from the general fund. If, however, any such payment is made to a premiere type tourist resort pursuant to the election, the amount which would have been received by such resort had the resort not exercised the election shall be earmarked and allocated to the general fund;

(iii) Any municipality shall have the right to take not more than two (2) special censuses at its own expense at any time during the interim between the regular decennial federal census. Such right shall include the current decenium. Any such census shall be taken by the federal bureau of the census, or in a manner directed by and satisfactory to the Tennessee state planning office. The population of the municipality shall be revised in accordance with the special census for purposes of distribution of such funds, ef-

fective on the first day of the next July following the certification of the census results by the federal bureau of the census or the state planning office to the commissioner of finance and administration; the aggregate population shall likewise be adjusted in accordance with any such special census, effective the same date as aforesaid;

(iv) Provided, that any such special census of the entire municipality taken in the same manner provided herein, under any other law, shall be used for the distribution of such funds, and in that case, no additional special census shall be taken under the provisions of this section;

(v) Before distributing moneys to incorporated municipalities from the sales tax, as provided for herein, the commissioner of finance and administration shall make a deduction therefrom monthly of the sum of fifty thousand seven hundred and fifty dollars) (\$50,750) per month of the twelve and one-half percent ($12\frac{1}{2}\%$) of sales tax collections allocated to incorporated municipalities, which sum together with an appropriation per annum from the general fund of the state shall be apportioned and transmitted to the University of Tennessee for use by the university in establishing and operating a municipal technical advisory service in its institute for public service, and shall be used for studies and research in municipal government, publications, educational conferences and attendance thereat and in furnishing technical, consultative and field services to municipalities in problems relating to fiscal administration, accounting, tax assessment and collection, law enforcement, improvements and public works, and in any and all matters relating to municipal government. This program shall be carried on in cooperation with and with the advice of cities and towns in the state acting through the Tennessee municipal league and its executive committee, which is recognized as their official agency or instrumentality;

(B) Eighty percent (80%) shall be used for education and shall be subject to appropriation, allocation, and allotment for that purpose;

(C) Four percent (4%) is allocated to the general fund;

(D) One percent (1%), or so much thereof as may be required, is appropriated to the department of revenue in addition to its regular appropriation to be expended by it in the administration and enforcement of this chapter; and

(E) Two and one-half percent (2½%) is appropriated to the sinking fund account to be used by the state funding board for the payment of interest and principal becoming due on state bonds issued by the state of Tennessee. [Acts 1947, ch. 3, § 15; 1947, ch. 149, § 1; 1949, ch. 17, § 1; 1949, ch. 248, § 1; 1949, ch. 261, § 1; C. Supp. 1950, § 1248.87 (Williams, §§ 1328.37, 1328.37a); Acts 1951, ch. 241, § 1; 1953, ch. 50, § 1; 1953, ch. 195, § 1; modified; 1955, ch. 51, § 13; 1955, ch. 190, § 1; 1957, ch. 130, § 1; 1957, ch. 136, § 1; 1957, ch. 363, § 1; impl. am. Acts 1959, ch. 9, §§ 3, 14; Acts 1959, ch. 67, § 1; 1959, ch. 276, § 1; impl. am. Acts 1961, ch. 97, § 3; Acts 1961, ch. 187, § 1; 1963, ch. 276, § 1; 1965, ch. 281, § 1; 1967, ch. 315, § 1; 1969, ch. 172, § 1; 1970 (Adj. S.), ch. 430, § 1; 1971, ch. 117, § 5; 972 (Adj. S.), ch. 542, §§ 1-3, 15; 1972 (Adj. S.), ch. 589, § 1; 1973, ch. 232, § 1; 1974 (Adj. S.), ch. 494, § 1; 1974 (Adj. S.), ch. 516, § 2; 1974 (Adj. S.), ch. 593, § 1; 1975, ch. 197, § 1; 1976 (Adj. S.), ch. 466, § 4; 1977, ch. 6, §§ 1, 2; 1977, ch. 41, § 1; 1979, ch. 114, § 1; 1979, ch. 364, § 1; 1983, ch. 143, § 1; T.C.A. (orig. ed.), § 67-3047.]

PART 2—TAXES IMPOSED

67-6-201. *Taxable privilege declared.*—It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling

tangible personal property at retail in this state, or who uses or consumes in this state any item or article of tangible personal property as defined in this chapter, irrespective of the ownership thereof or any tax immunity which may be enjoyed by the owner thereof, or who is the recipient of any of the things or services taxable under this chapter, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined in this chapter, or who leases or rents such property, either as lessor or lessee, within the state of Tennessee. [Acts 1947, ch. 3, § 3; C. Supp. 1950, § 1248.52 (Williams, § 1328.24); Acts 1955, ch. 51, §§ 7, 8; 1955, ch. 242, § 6; 1959, ch. 15, § 2; 1963, ch. 38, §§ 3, 5; 1963, ch. 172, § 3; 1965, ch. 335 § 2; 1971, ch. 78, § 1; 1971, ch. 117, § 2; 1972 (Adj. S.), ch. 653, § 1; 1973, ch. 239, § 1; 1974 (Adj. S.), ch. 675, § 1; 1975, ch. 316, § 1; 1976 (Adj. S.), ch. 466, §§ 1, 3; 1982 (Adj. S.), ch. 610, § 1; 1982 (Adj. S.), ch. 646, § 1; 1983, ch. 378, § 1; 1983, ch. 402, § 1; T.C.A. (orig. ed.), § 67-3003.]

67-6-202. *Property sold at retail.*—For the exercise of the privilege of engaging in the business of selling tangible personal property at retail in this state, a tax is levied at the rate of four and one-half percent (4½%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax is to be computed on gross sales for the purpose of remitting the amount of tax due the state and is to include each and every retail sale. [Acts 1947, ch. 3, § 3; C. Supp. 1950, § 1248.52 (Williams, § 1328.24); Acts 1955, ch. 51, §§ 7, 8; 1955, ch. 242, § 6; 1959, ch. 15, § 2; 1963, ch. 38, §§ 3, 5; 1963, ch. 172, § 3; 1965, ch. 335, § 2; 1971, ch. 78, § 1; 1971,

ch. 117, § 2; 1972 (Adj. S.), ch. 653, § 1; 1973, ch. 239, § 1; 1974 (Adj. S.), ch. 675, § 1; 1975, ch. 316, § 1; 1976 (Adj. S.), ch. 466, §§ 1, 3; 1982 (Adj. S.), ch. 610, § 1; 1982 (Adj. S.), ch. 646, § 1; 1983, ch. 378, § 1; 1983, ch. 402, § 1; T.C.A. (orig. ed.), § 67-3003(a).]

67-6-203. *Property used, consumed, distributed or stored.*—A tax is levied at the rate of four and one-half percent ($4\frac{1}{2}\%$) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax. [Acts 1947, ch. 3, § 3; C. Supp. 1950, § 1248.52 (Williams, § 1328.24); Acts 1955, ch. 51, §§ 7, 8; 1955, ch. 242, § 6; 1959, ch. 15, § 2; 1963, ch. 38, §§ 3, 5; 1963, ch. 172, § 3; 1965, ch. 335, § 2; 1971, ch. 78, § 1; 1971, ch. 117, § 2; 1972 (Adj. S.), ch. 653, § 1; 1973, ch. 239, § 1; 1974 (Adj. S.), ch. 675, § 1; 1975, ch. 316, § 1; 1976 (Adj. S.), ch. 466, §§ 1, 3; 1982 (Adj. S.), ch. 610, § 1; 1982 (Adj. S.), ch. 646, § 1; 1983, ch. 378, § 1; 1983, ch. 402, § 1; T.C.A. (orig. ed.), § 67-3003(b).]

67-6-204. *Lease or rental of property.*—It is declared to be the intention of this chapter to impose a tax on the gross proceeds of all leases and rentals of tangible personal property in this state where the lease or rental is a part of the regularly establishment business, or the same is incidental or germane thereto. The tax is levied as follows:

(1) At the rate of four and one-half percent ($4\frac{1}{2}\%$) of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, where the lease or rental of such property is an established business,

or part of an established business, or the same is incidental or germane to the business.

(2) At the rate of four and one-half percent ($4\frac{1}{2}\%$) of the monthly lease or rental price by lessee or renter, or contracted or agreed to be paid by lessee or renter, to the owner of the tangible personal property. [Acts 1947, ch. 3, §§ 3, 8; C. Supp. 1950, §§ 1248.52, 1248.64 (Williams, §§ 1328.24, 1328.30); Acts 1955, ch. 51, §§ 7, 8, 12; 1955, ch. 242, § 6; 1959, ch. 15, § 2; 1963, ch. 38, §§ 3, 5; 1963, ch. 172, § 3; 1965, ch. 335, § 2; 1971, ch. 78, § 1; 1971, ch. 117, § 2; 1972 (Adj. S.), ch. 653, § 1; 1973, ch. 239, § 1; 1974 (Adj. S.), ch. 675, § 1; 1975, ch. 316, § 1; 1976 (Adj. S.), ch. 466, §§ 1, 3; 1982 (Adj. S.), ch. 610, § 1; 1982 (Adj. S.), ch. 646, § 1; 1983, ch. 378, § 1; 1983, ch. 402, § 1; T.C.A. (orig. ed.), §§ 67-3003(c), (d), 67-3024.]

67-6-205. *Services*.—There is levied a tax at the rate of four and one-half percent ($4\frac{1}{2}\%$) of the gross charge for all services taxable under this chapter. [Acts 1947, ch. 3, § 3; C. Supp. 1950, § 1248.52 (Williams, § 1328.24); Acts 1955, ch. 51, §§ 7, 8; 1955, ch. 242, § 6; 1959, ch. 15, § 2; 1963, ch. 38, §§ 3, 5; 1963, ch. 172, § 3; 1965, ch. 335, § 2; 1971, ch. 78, § 1; 1971, ch. 117, § 2; 1972 (Adj. S.), ch. 653, § 1; 1973, ch. 239, § 1; 1974 (Adj. S.), ch. 675, § 1; 1975, ch. 316, § 1; 1976 (Adj. S.), ch. 466, §§ 1, 3; 1982 (Adj. S.), ch. 610, § 1; 1982 (Adj. S.), ch. 646, § 1; 1983, ch. 378, § 1; 1983, ch. 402, § 1; T.C.A. (orig. ed.), § 67-3003 (e).]

67-6-206. *Industrial machinery and raw materials*.—*Exemptions*.—(a) Notwithstanding other provisions of this chapter, tax imposed with respect to industrial machinery as defined in § 67-6-102 shall be at the following rate:

- (1) July 1, 1980—June 30, 1981— .75% ;
- (2) July 1, 1981—June 30, 1982— .50% ;
- (3) July 1, 1982—June 30, 1983— .25% ; and
- (4) On and after July 1, 1983, no tax is due with respect to industrial machinery.

(b)(1) Tax at the rate of one percent (1%) is likewise imposed with respect to water when sold to or used by manufacturers. Tax at the rate of one and one-half percent (1½%) shall be imposed with respect to gas, electricity, fuel oil, coal and other energy fuels when sold to or used by manufacturers.

(2) For the purpose of this subsection a manufacturer is defined as one whose principal business is fabricating or processing tangible personal property for resale.

(3) Such substances shall be exempt entirely from the taxes imposed by this chapter whenever it may be established to the satisfaction of the commissioner, by separate metering or otherwise, that they are exclusively used directly in the manufacturing process, coming into direct contact with the article being fabricated or processed by the manufacturer, and being expended in the course of such contract. Whenever the commissioner determines that the use of such substances by a manufacturer meets said test, he shall issue a certificate evidencing the entitlement of the manufacturer to the exemption, and a certified copy thereof shall be furnished by the manufacturer to his supplier of such exempt substances. The certificate may be revoked by the commissioner at any time upon a finding that the conditions precedent to the exemption no longer exist. His action as to the granting

or revoking of a certificate shall be reviewable solely by a petition for common law certiorari addressed to the chancery court of Davidson County.

(4) Any water or energy fuel used by a manufacturer in fabricating processing tangible personal property for resale shall be exempt entirely from the taxes imposed by this chapter when same are produced or extracted by the manufacturer himself from facilities owned by him or in the public domain. [Acts 1947, ch. 3, § 3; C. Supp. 1950, § 1248.52 (Williams, § 1328.24); Acts 1955, ch. 51, §§ 7, 8; 1955, ch. 242, § 6; 1959, ch. 15, § 2; 1963, ch. 38, §§ 3, 5; 1963, ch. 172, § 3; 1965, ch. 335, § 2; 1971, ch. 78, § 1; 1971, ch. 117, § 2; 1972 (Adj. S.), ch. 653, § 1; 1973, ch. 239, § 1; 1974 (Adj. S.), ch. 675, § 1; 1975, ch. 316, § 1; 1976 (Adj. S.), ch. 466, §§ 1, 3; 1980 (Adj. S.), ch. 871, § 1; 1982 (Adj. S.), ch. 610, § 1; 1982 (Adj. S.), ch. 646, § 1; 1983, ch. 378, § 1; 1983, ch. 402, § 1; T.C.A. (orig. ed.), §67-3003(g).]

67-6-207. *Farm equipment and machinery.*—Notwithstanding other provisions of this chapter, tax imposed with respect to farm equipment and machinery as defined in § 67-6-102 shall be at the following rate:

- (1) July 1, 1980—June 30, 1981— .75% ;
- (2) July 1, 1981—June 30, 1982— .50% ;
- (3) July 1, 1982—June 30, 1983— .25% ; and

(4) On and after July 1, 1983, no tax is due with respect to farm equipment and machinery. [Acts 1947, ch. 3, § 3; C. Supp. 1950, § 1248.52 (Williams, § 1328.24); Acts 1955, ch. 51, §§ 7, 8; 1955, ch. 242, § 6; 1959, ch. 15, § 2; 1963, ch. 38, §§ 3, 5; 1963, ch. 172, § 3; 1965, ch. 335, § 2;

1971, ch. 78, § 1; 1971, ch. 117, § 2; 1972 (Adj. S.), ch. 653, § 1; 1973, ch. 239, § 1; 1974 (Adj. S.), ch. 675, § 1; 1975, ch. 316, § 1; 1976 (Adj. S.), ch. 466, §§ 1, 3; 1980 (Adj. S.), ch. 871, § 2; 1982 (Adj. S.), ch. 610, § 1; 1982 (Adj. S.), ch. 646, § 1; 1983, ch. 378, § 1; 1983, ch. 402, § 1; T.C.A. (orig. ed.), § 67-3003(h).]

67-6-208. *Fuels for residential use.*—(a) Tax at the rate of one and one-half percent (1½%) shall be imposed with respect to gas, electricity, fuel oil, coal and other energy fuels sold directly to the consumer for residential use.

(b)(1) For the purpose of this section “sold directly to the consumer for residential use” shall include the furnishing of gas, electricity, fuel oil, coal or other energy fuels to single private residences, including the separate private units of apartment houses and other multiple dwellings, actually used for residential purposes, which are separately metered or measured, irrespective of the fact that a person other than the resident:

(A) Is contractually bound to the supplier for the charges;

(B) Actually pays the charges; or

(C) Is billed for the charges.

(2) The definition of “sold directly to the consumer for residential use” shall be retroactive to April 1, 1976, and shall apply to all sales of gas, electricity, fuel oil, coal and other energy fuels sold directly to the consumer for residential use on or after April 1, 1976.

(c) The one and one-half percent (1½%) rate shall continue to apply when residential use is discontinued for

a period of sixty (60) days or less. If residential use is not resumed within such sixty (60) day period, the sale of electricity and other energy fuels after such period shall be taxed at the rate provided in 67-2-202.

(d) Use of electricity and other energy fuels in hotel or motel units by transient occupants shall not constitute residential use. [Acts 1947, ch. 3, § 3; C. Supp. 1950, § 1248.52 (Williams, § 1328.24); Acts 1955, ch. 51, §§ 7, 8; 1955, ch. 242, § 6; 1959, ch. 15, § 2; 1963, ch. 38, §§ 3, 5; 1963, ch. 172, § 3; 1965, ch. 335, § 2; 1971, ch. 78, § 1; 1971, ch. 117, § 2; 1972 (Adj. S.), ch. 653, § 1; 1973, ch. 239, § 1; 1974 (Adj. S.), ch. 675, § 1; 1975, ch. 316, § 1; 1976 (Adj. S.), ch. 466, §§ 1, 3; 1982 (Adj. S.), ch. 610, § 1; 1982 (Adj. S.), ch. 646, § 1; 1983, ch. 378, § 1; 1983, ch. 402, § 1; T.C.A. (orig. ed.), § 67-3003(i).]

67-6-209. *Use of property produced or severed from earth—Exemptions.*—(a) Where a manufacturer, producer, compounder or contractor erects or applies tangible personal property, which he has manufactured, produced, compounded or severed from the earth, other than:

(1) Any severed from the earth and moved from one (1) place to another on the same construction or job site; and

(2) Dirt, soil, earth or any other kind of material when used for fill, whether from the same construction or job site or elsewhere, such person so using the tangible personal property shall pay the tax herein levied on the fair market value of such tangible personal property when used, without any deductions whatsoever, provided, however, the foregoing shall not be construed to apply to contractors or subcontractors who fabricate, erect or apply tangible personal property which becomes a component

part of a building, and which is not sold by them as a manufactured item.

(b) Where a contractor or subcontractor herein-after defined as a dealer uses tangible personal property in the performance of his contract, or to fulfill contract or subcontract obligations, whether the title to such property be in the contractor, subcontractor, contractee, subcontractee, or any other person, or whether the title holder of such property would be subject to pay the sales or use tax, except where the title holder is a church and the tangible personal property is for church construction, such contractor or subcontractor shall pay a tax at the rate prescribed by § 67-6-203 measured by the purchase price or fair market value of such property, whichever is greater, unless such property has been previously subjected to a sales or use tax, and the tax due thereon has been paid.

(c)—The tax imposed by this section shall have no application where the contractor or subcontractor, and the purpose for which such tangible personal property is used, would be exempt from the sales or use tax under any other provision of this chapter.

(d) The tax imposed by this section or by any other provision of this chapter, as amended shall have no application with respect to the use by, or the sale to, a contractor or subcontractor of atomic weapon parts, source materials, special nuclear materials and by-product materials, all as defined by the Atomic Energy Act of 1954, or with respect to such other materials as would be excluded from taxation as industrial materials under § 67-6-102(13)(E) when the items referred to in this subsection are sold or leased to a contractor or subcontractor for use in, or experimental work in connection with, the manu-

facturing processes for on or behalf of the atomic energy commission or when any of such items are used by a contractor or subcontractor in such experimental work or manufacturing processes.

(e) There is hereby exempted from the provisions of this chapter, the sale or use of materials and equipment purchased or used for construction or installation, by a contractor, subcontractor or otherwise, of, in or as a part of any electric generating plant or distribution system, any resource recovery facility where steam or electric energy is produced, or any coal gasification plant or distribution system owned or operated by the United States or any agency thereof created by an act of congress, or by the state of Tennessee or any agency or political subdivision thereof, or any authority organized pursuant to the state electric membership corporation law, compiled in chapter 24 of title 65, or the electric cooperative law, compiled in chapter 25 of title 65. There is also exempted the sale or use of materials and equipment purchased or used for construction or installation by a contractor, subcontractor or otherwise, of, in or as a part of any electric generating plant, including the transmission substation, owned or operated by any person so long as such person does not now or intend in the future to generate electricity from a plant located in Tennessee or to distribute electricity to consumers in Tennessee. [Acts 1949, ch. 245, § 1; C. Supp. 1950, § 1248.52 (Williams, § 1328.24); Acts 1955, ch. 242, § 7; 1957, ch. 166, § 1; 1963, ch. 38, § 6; 1963, ch. 174, § 1; 1978 (Adj. S.), ch. 536, § 1; 1978 (Adj. S.), ch. 601, § 1; 1980 (Adj. S.), ch. 563, § 1; 1980 (Adj. S.), ch. 812, § 1; T.C.A. (orig. ed.), §67-3004(a)-(e).]

67-6-210. *Use of property imported by dealer—Exemptions.*—(a) On all tangible personal property imported, or caused to be imported from other states or foreign country, and used by him, the “dealer” as defined in § 67-6-102(4), shall pay the tax imposed by this chapter on all articles of tangible personal property so imported and used, the same as if the articles had been sold at retail for use or consumption in this state. For the purposes of this chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

(b) It is not the intention of this section to levy the use tax with respect to the personal automobile, the personal effects, or the household furniture to be used in the residence of a person who, having been a bona fide resident of another state, has moved to and become a resident of Tennessee, and has caused to be imported into Tennessee such personal automobile, personal effects, or household furnishing. [Acts 1947, ch. 3, § 4; C. Supp. 1950, § 1248.55 (Williams, § 1328.25); Acts 1967, ch. 117, § 1; T.C.A. (orig. ed.), § 67-3005.]

67-6-211. *Property no longer in interstate commerce.*—It is the intention of this chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state. [Acts 1947, ch. 3, § 4; C. Supp. 1950, § 1248.56 (Williams, § 1328.25); T.C.A. (orig. ed.), § 67-3007.]

PART 3—EXEMPTIONS

67-6-301. *Agricultural products.*—(a) The gross proceeds derived from the sale in this state of livestock, nursery stock, poultry and other farm or nursery products, in any calendar year, directly from a farmer or nurseryman, are exempted from the tax levied by this chapter if fifty percent (50%) or more of such products are grown and produced in the calendar year by such farmer or nurseryman. If less than fifty percent (50%) of such products in any calendar year are grown or produced by the farmer or nurseryman, then only the gross proceeds of the sale in this state of the products actually grown or produced by such farmer or nurseryman shall be exempt from the tax levied by this chapter. When sales of livestock, nursery stock, poultry, or other farm or nursery products are made to consumers, other than as provided herein, they are not exempted from the tax imposed by this chapter.

(b) It is specifically provided that the “use tax” as defined herein shall not apply to livestock and livestock products, to poultry and poultry products, to farm, nursery and agricultural products, when produced by the farmer or nurseryman and used by him and members of his family.

(c)(1) Provided, however, that each and every agricultural commodity sold by any person, other than a producer, to any other person, who purchases not for direct consumption but for the purpose of acquiring raw products for use or for sale in the process of preparing, finishing, or manufacturing such agricultural commodity for the ultimate retail consumer trade shall be and is ex-

empted from any and all provisions of this chapter, including payment of the tax applicable to the sale, storage, use, transfer, or any other utilization or handling thereof, except when such agricultural commodity is actually sold as a marketable or finished product to the ultimate consumer, and in no case shall more than one (1) tax be exacted.

(2) "Agricultural commodity," for the purposes of this section, means horticultural, poultry, and farm products, and livestock and livestock products. [Acts 1947, ch. 3, § 5; C. Supp. 1950, § 1248.60 (Williams, § 1328.26); Acts 1978 (Adj. S.), ch. 921, §§ 2, 3; 1983, ch. 162, § 1; T.C.A. (orig. ed.), § 67-3011.]

67-6-302. *Aircraft parts and supplies.*—There shall be exempt from sales or use tax, use, storage or consumption of parts, accessories, materials and supplies sold to or used by commercial interstate or international air carriers for use exclusively in servicing and maintaining such carriers' aircraft, which aircraft are used principally in interstate or international commerce. This exemption shall not apply to fuel and other petroleum products or to shop equipment and tools. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1;

1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-303. *Armed forces—Automobiles.*—There shall be exempted from the tax imposed by this chapter any sale of a motor vehicle to a nonresident member of a uniformed service, as defined in the Internal Revenue Code of 1954, stationed under orders of his branch of service on a military reservation located partially within the boundary of Tennessee and that of another state. Dealers shall support each such sale by attachment to their file copy of the invoice evidencing it a copy of the official orders relating to stationing of the purchaser and proof of nonresidency. This exemption shall terminate upon publication in the Tennessee administrative register of a certification made by the commissioner of revenue to the secretary of state that a substantially identical exemption is no longer accorded by the other state whose boundary encompasses the other portion of a military reservation located only partially within the boundary of this state. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194,

§ 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012].

67-6-304. *Blood and plasma*.—There shall be exempt from the tax imposed by this chapter the sale of human blood, blood plasma, or any part thereof by any institution or organization which has received a determination of exemption from the Internal Revenue Service under § 501 (c)(3) of the Internal Revenue Code. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2,

§ 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-305. *Demonstration property.*—There shall be exempt from sales or use tax the transfer, by any dealer in personal property, of any item from inventory to be used for demonstration purposes; provided that such article of personal property shall be returned to inventory for sale in the usual course of trade within one hundred twenty (120) days; if such article of personal property is used for demonstration purposes for a period in excess of one hundred twenty (120) days, the dealer shall pay a use tax thereon for the amount that the cost of the article to the dealer exceeds the sales price of the article upon which sales tax is regularly assessed and paid when it is subsequently sold to a consumer. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955,

ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976, (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-306. *Divorce—Transfer of automobile.*—There shall be exempt from sales and use tax the transfer between spouses of an automobile when such transfer is the result of a decree of divorce terminating that marriage. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1;

1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-307. *Energy or resource recovery facilities.*—There shall be excluded from the sales and use tax base that portion of the consideration, received from the sale of steam produced by an energy or resource recovery facility owned or operated by a municipality, which is used to satisfy an indebtedness to the state incurred pursuant to §§ 68-31-401—68-31-416. This exclusion shall only apply if the facility has no more than one customer, and the portion of the consideration subject to the exclusion is separately stated on each billing. In the event ownership of the facility is transferred to the facility's sole customer, that portion of the consideration previously excluded from taxation shall be taxable to the customer. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch.

32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-308. *Federal government.* — Notwithstanding § 67-6-501(a), no sales or use tax shall be payable on account of any direct sale or lease of tangible personal property or services to the United States, or any agency thereof created by congress, for consumption or use directly by it through its own government employees. [Acts 1949, ch. 245, § 1; C. Supp. 1950, § 1248.52 (Williams, § 1328.24); Acts 1955, ch. 242, § 7; 1957, ch. 166, § 1; 1963, ch. 38, § 6; 1963, ch. 174, § 1; 1978 (Adj. S.), ch. 536, § 1; 1978 (Adj. S.), ch. 601, § 1; 1980 (Adj. S.), ch. 563, § 1; 1980 (Adj. S.), ch. 812, § 1; T.C.A. (orig. ed.), § 67-3004(f).]

67-6-309. *Film and transcription rentals.*—There shall be exempted from the tax imposed by this chapter all rental from films to theaters which pay the privilege tax of one

percent (1%) of their gross receipts, as provided by § 67-4-408. There shall also be exempt from the provisions of this chapter all rental for films, transcriptions and recordings to radio stations and television stations operating under a certificate from the federal communications commission. [Acts 1951, ch. 172, § 1; 1953, ch. 128, § 1; (Williams, § 1328.27); modified; T.C.A. (orig. ed.), § 67-3013.]

67-6-310. *Gun shows—Sales by nonprofit organizations.*—There shall be exempt from the sales and use tax the proceeds derived from sales at gun shows, displays or exhibits, sponsored by any nonprofit organization of gun collectors. This exemption shall not be applicable to any sale made by a person who regularly engages in business as a dealer in guns, or to any sale of a gun for future delivery. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.),

ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed. § 67-3012.)

67-6-311. *Industrial machinery transferred between parent and subsidiary corporations.*—There shall be exempt from the tax imposed by this chapter the sale, transfer, or lease of industrial machinery, as that term is defined in § 67-6-102, to or from a parent corporation and a wholly owned subsidiary to the extent that such Tennessee sales and use tax applicable to such machinery has previously been paid by such parent or subsidiary corporations. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982

(Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-312. *Insulin*.—There shall be exempt from sales and use tax the sale, at retail, of insulin and any syringe used to dispense insulin. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-313. *Interstate commerce*.—It is not the intention of this chapter to levy a tax upon articles of tangible personal property imported into this state or produced or manufactured in this state for export; nor is it the intention of this chapter to levy a tax on bona fide interstate

commerce. [Acts 1947, ch. 3, § 4; C. Supp. 1950, § 1248.56 (Williams, § 1328.25); T.C.A. (orig. ed.), § 67-3007.]

67-6-314. *Medical equipment and devices for-handicapped persons*—There shall be exempt from the sales tax imposed by this chapter:

(1) The transfer of an artificial limb to a person who has need for such artificial limb due to his loss of an arm or leg or any part thereof and the retail sale of lift devices designed to permit ingress and egress of handicapped persons confined to wheelchairs from their personal motor vehicles;

(2) The sale of any item necessary for the use or wearing of any artificial limb;

(3) The sale of a wheelchair to a handicapped person ~~who has need~~ for such device;

(4) The sale of, to handicapped persons who personally use such items, any necessary maintenance service on any artificial limb, lift device, or wheelchair; and

(5) The sale of prosthetics, orthotics, special molded orthopedic shoes, walkers, crutches, surgical supports of all kinds, and other similarly medical corrective or support appliances and devices. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976

(Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 489, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 238, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-315. *Motor vehicles moved outside state.*—There shall be exempt from the sales tax the retail sale of motor vehicles subject to registration and titling in this state pursuant to § 55-3-101, that are not registered and titled in this state but are removed for use in another state within three (3) calendar days of purchase. Use of such motor vehicles within this state subsequent to purchase, but prior to removal from the state, shall not constitute a use subject to tax. For the purposes of this section, vehicles subject to registration and titling in this state pursuant to § 55-3-101 shall be deemed to include all off-highway motor vehicles as defined in § 55-3-1-1(c)(2) purchased on or after April 13, 1981. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1;

1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-316. *Optometrists, opticians, and ophthalmologists.*—An optometrist, optician or ophthalmologist shall be considered the user and consumer of the tangible personal property used in the practice of his profession, and the tax levied under this chapter shall not be applicable to all or any part of the charge made by such persons to their patients. All sales of tangible personal property and taxable services to an optometrist, optician or ophthalmologist shall be subject to the sales or use tax. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 61, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258,

§ 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-317. *Ostomy products*.—There shall be exempt from the tax imposed by this chapter the sale of ostomy products or appliances for use by persons who have had colostomies, ileostomies, or urostomies. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1;

impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-318. *Oxygen*.—There shall be exempt from the tax imposed by this chapter any sales of oxygen prescribed or recommended for the medical treatment of a human being by a licensed practitioner of the healing arts, and equipment necessary to administer such oxygen. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391,

§§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-319. *Pharmaceutical samples.*—There shall be exempt from the sales and use tax samples produced by a pharmaceutical plant within the state for future distribution outside of the state or temporarily stored by such pharmaceutical plant within the state for future distribution outside of the state. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 193, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-320. *Prescription drugs.*—(a) There shall be exempt from the tax imposed by this chapter any prescription drug or medicine issued by a licensed pharmacist in accordance with an individual prescription written for the use of a human being by a practitioner of the healing arts licensed by the state of Tennessee.

(b) There shall also be exempt from the tax imposed by this chapter any prescribed drug or medicine sold to a practitioner of the healing arts licensed by the state of Tennessee or issued by a licensed pharmacist for use in the treatment of a human being. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-321. *Railroad stock — Vessels and barges.*—

There shall be exempt from sales tax the transfer, by any dealer in personal property, of railroad rolling stock or of vessels or barges of fifty (50) tons or over of displacement where the purchaser gives the seller an affidavit that such vessels or rolling stock are being purchased for use in interstate commerce or outside the state of Tennessee; and any such vessel or rolling stock shall also be exempt from use tax so long as it is being used in interstate commerce. [Acts 1947, ch. 3 § 6; 1949, ch. 245, § 2; C. Supp. 1950 § 1248.61. (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70 § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-322. *Religious, educational, and charitable institutions.*—

(a) There shall be exempt from the provisions

of this chapter any sales or use tax upon tangible personal property or taxable services sold, given, or donated to any:

- (1) Church;
- (2) University, including the Agricultural Foundation for Tennessee Tech. Inc.;
- (3) College;
- (4) School;
- (5) Orphanage;
- (6) Institution organized for the principal purpose of placing homeless children in foster homes;
- (7) Home for the aged;
- (8) Hospital;
- (9) Girls' club;
- (10) Boys' club;
- (11) Community health council;
- (12) Volunteer fire department;
- (13) Organ bank for transplantable tissue;
- (14) Organization whose primary objective is to promote the spiritual and recreational environment of members of the armed services of the United States of America, such as the United Service Organization as it is presently conducted;
- (15) Historical property owned by the state and operated by the historical commission or under the jurisdiction of the commission as authorized by § 4-11-108;
- (16) Nonprofit community blood banks;

(17) Senior citizen service centers which meet the standards set by the Tennessee commission on aging for eligibility to receive state funds; or

(18) Nonprofit corporation whose primary function involves the annual organization, promotion, and sponsorship of a statewide talent and beauty pageant in which contestants compete for scholarships, awarded by such nonprofit corporation, as well as for the opportunity of being Tennessee's representative and contestant in an annual nationwide talent and beauty pageant with which such nonprofit corporation is affiliated.

(b) In addition to the exempt institutions, organizations and historical properties described in subsection (a) there shall also be exempt such other institutions and organizations which have received a determination of exemption from the Internal Revenue Service under § 501(c)(3) (26 U.S.C. § 501(c)(3)) of the Internal Revenue Code and are currently operating under it.

(c) Any exemption granted under subsection (a) or (b) shall be limited to such institutions, organizations or historical properties which are not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(d) Any exemption granted under the preceding subsections shall only apply to sales, gifts, or donations made directly to the exempt institution, organization or historical property. There shall be no exemption upon sales, gifts, or donations made to an independent contractor with any such exempt institution, organization or historical property.

(e) No dealer shall sell, give, or donate and no user shall use any tangible personal property under the claim that the same is exempt from the sales or use tax levied by this chapter, where the exemption from taxation is claimed because the vendee or user is an educational, religious or charitable institution or organization or historical property and is entitled to an exemption as such institution or organization or historical property under subsections (a)-(d), unless the vendee or user shall have issued to it by the commissioner an exemption certificate declaring that such institution or organization or historical property is entitled to the exemption provided for by subsections (a)-(d).

(f) The commissioner is authorized to make final determination after hearing, if demanded, as to whether any institution or organization or historical property is entitled to the benefit of the exemption established by subsections (a)-(d). The commissioner is authorized to issue exemption certificates to institutions and organizations and historical properties which, in his judgment, are entitled thereto. [Acts 1949, ch. 110, § 1; 1949, ch. 237, § 1; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1967, ch. 364, § 1; 1967, ch. 369, § 1; 1968 (Adj. S.), ch. 531, § 1; 1973, ch. 263, § 1; 1975, ch. 125, § 1; 1975, ch. 27, §§ 1, 2; 1975, ch. 290, § 1; 1976 (Adj. S.), ch. 619, § 1; 1976 (Adj. S.), ch. 684, § 1; 1976 (Adj. S.), ch. 791, § 1; 1977, ch. 97, §§ 1, 2; 1977, ch. 126, § 1; 1979, ch. 63, §§ 1-4; 1979, ch. 168, § 1; T.C.A. (orig. ed.), § 67-3014.]

67-6-323. *Religious publications.*—The taxes levied under this chapter shall not apply to the use, sale, or distribution of religious publications to or by churches or other religious or charitable institutions for use in the customary

religious or charitable activities. [Acts 1947, ch. 3, § 4; C. Supp. 1950, § 1248.59 (Williams, § 1328.25); T.C.A. (orig. ed.), § 67-3010.]

67-6-324. *Replacement parts or goods.*—There shall be exempt from sales tax any replacement parts or goods transferred without cost to a purchaser for the replacement of faulty parts or equipment which prior thereto had been sold under a warranty or guarantee or condition and upon which original purchase or importation a sales or use tax was paid. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § T.C.A. (orig. ed.), 67-3012.]

67-6-325. *Telephone cooperatives*.—There shall be exempt from the provisions of this chapter all sales of tangible personal property to telephone cooperatives organized under the general welfare laws of this state. This exemption shall apply only to sales of tangible personal property to telephone cooperatives for their own use and consumption, and shall not apply to any purchases made by the telephone cooperatives for use by independent contractors. This section shall apply only so long as electric membership corporations organized under the electric membership corporation law, compiled in chapter 24 of title 65, and electric cooperatives organized under the electric cooperative law, compiled in chapter 25 of title 65, shall be entitled to an exemption from the payment of any sales and use tax. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982

(Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-326. *Vessels*.—There shall be exempted from the taxes imposed by this chapter all sales of tangible personal property to commercial marine vessels for use by such vessels where the deliveries of such property are made in mid-stream of waterways constituting geographical boundaries of this state. Dealers shall, however, be required to support such sales by bills of sale positively reflecting such delivery receipted by the master of the deliverer vessel. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-327. *Vessels and barges—Repairs.*—There shall be exempt from the tax imposed by this chapter, repair services performed on vessels and barges of fifty (50) tons and over load displacement, which are used principally in interstate or international commerce, and the parts, accessories, materials and supplies used in such repairs where the parts, accessories, materials and supplies become component parts of such vessels and barges. For purposes of this section, repair services shall include renovations and improvements to such vessels and barges. This exemption shall not apply to fuel and other petroleum products or to shop equipment and tools. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; ch. 102, § 3;

1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-328. *Watershed districts.*—There shall be exempt from sales or use tax all sales of tangible personal property to watershed districts for use and consumption by such districts. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27) Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963 ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330, § 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

67-6-329. *Miscellaneous exemptions.*—The sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of the following tangible personal property is specifically exempted from the tax imposed by this chapter.

(1) Gasoline as defined by statute in Tennessee, upon which a privilege tax per gallon is paid, and not re-

funded, or gasoline or diesel fuel used for "agricultural purposes" as this term is defined in § 67-3-202. For purposes of this subsection "diesel fuel" means any petroleum distillate with at least twelve (12) to sixteen (16) carbon atoms per molecule and which has a boiling point of between three hundred fifty degrees (350°) and six hundred fifty degrees (650°) F. or any petroleum distillate which is ordinarily and customarily sold and used as a source of fuel for diesel engines;

(2) Motor vehicle fuel now taxed per gallon by part 8, chapter 3 of this title;

(3) Newspapers;

(4) Seedlings, plants grown from seed or liners (cuttings) when sold to a farmer and nurseryman;

(5) Fertilizer and containers used for farm products and field and garden seeds when sold directly to the farmer and nurseryman.

(6) Insecticide and pesticide chemicals when sold directly to and used by the farmer and nurseryman;

(7) Fungicide chemicals when sold directly and used by the farmer and nurseryman;

(8) Herbicide chemicals when sold directly to the farmer and nurseryman used to destroy or prevent the growth of weeds and bushes;

(9) Livestock and poultry feeds;

(10) Shoppers' advertisers using newsprint distributed in Tennessee or within a twenty-five (25) mile radius thereof at regular intervals and provided without charge to the shopper;

(11) Caskets and burial vaults used in the burial of the dead, up to or not to exceed five hundred dollars (\$500);

(12) School books and school lunches;

(13) All sales made to the state of Tennessee or any county or municipality within the state;

(14) Hearing aids, as this term is defined in § 63-15-102;

(15) Surfactants sold directly to a farmer or nurseryman for use as solutions to be mixed with insecticides, pesticides, fungicides, or herbicides;

(16) Adjuvants sold directly to a farmer or nurseryman for use as a soil conditioner; and

(17) Plastic used in the care and raising of plants when sold directly to or used by the farmer or nurseryman. [Acts 1947, ch. 3, § 6; 1949, ch. 245, § 2; C. Supp. 1950, § 1248.61 (Williams, § 1328.27); Acts 1955, ch. 51, § 6; 1955, ch. 194, § 1; 1955, ch. 340, §§ 1, 2; 1961, ch. 248, § 1; 1963, ch. 38, § 4; 1963, ch. 112, § 1; 1963, ch. 137, § 1; 1963, ch. 268, § 1; 1965, ch. 32, § 1; 1965, ch. 164, § 1; 1967, ch. 98, § 1; 1969, ch. 2, § 1; 1971, ch. 39, § 1; 1971, ch. 113, § 1; 1971, ch. 258, § 1; 1973, ch. 173, § 1; 1976 (Adj. S.), ch. 466, § 2; 1976 (Adj. S.), ch. 524, § 1; 1976 (Adj. S.), ch. 689, § 1; 1976 (Adj. S.), ch. 711, § 1; 1976 (Adj. S.), ch. 733, § 1; 1977, ch. 79, § 1; 1977, ch. 150, § 1; 1977, ch. 268, § 1; 1977, ch. 487, § 1; 1978 (Adj. S.), ch. 732, § 1; 1978 (Adj. S.), ch. 733, § 1; impl. am. Acts 1978 (Adj. S.), ch. 761, § 116; 1978 (Adj. S.), ch. 793, § 1; 1978 (Adj. S.), ch. 831, § 1; 1978 (Adj. S.), ch. 832, § 1; 1978 (Adj. S.), ch. 921, § 4; 1979, ch. 191, § 1; 1979, ch. 239, § 1; 1979, ch. 330,

§ 1; 1979, ch. 338, § 1; 1979, ch. 349, § 1; 1979, ch. 387, § 1; 1979, ch. 391, §§ 1, 2; 1980 (Adj. S.), ch. 613, § 1; 1980 (Adj. S.), ch. 748, § 1; 1980 (Adj. S.), ch. 863, § 1; 1981, ch. 70, § 1; 1981, ch. 133, § 1; 1981, ch. 273, § 1; 1982 (Adj. S.), ch. 576, § 1; 1982 (Adj. S.), ch. 634, § 1; 1983, ch. 102, § 3; 1983, ch. 140, § 1; 1983, ch. 162, § 2; T.C.A. (orig. ed.), § 67-3012.]

PART 4—ADMINISTRATIVE PROVISIONS

67-6-401. *Administration by commissioner.*—The commissioner shall administer and enforce the assessment and collection of the taxes and penalties imposed by this chapter. [Acts 1947, ch. 3, § 14; C. Supp. 1950, § 1248.86 (Williams, § 1328.36); T.C.A. (orig. ed.), § 67-3046.]

67-6-402. *Rules and regulations.*—(a) The commissioner shall have the power to make and publish reasonable rules and regulations not inconsistent with this chapter or the other laws, or the Constitution of this state or the United States, for the enforcement of the provisions of this chapter and the collection of revenues hereunder.

(b) The commissioner is authorized to make and publish such rules and regulations not inconsistent with this chapter as he may deem necessary in enforcing its provisions in order that there shall not be collected on the average more than the rate levied herein. The commissioner is authorized to and he shall provide by rule and regulation a method for accomplishing this end, and he shall prepare instructions to dealers by setting out to them suitable brackets of prices for applying the tax or any other method that may be necessary for the purpose of the enforcement of this chapter and the collection of the tax imposed thereby. [Acts 1947, ch. 3, §§ 13, 14; C. Supp.

1950, §§ 1248.85, 1248.86 (Williams, §§ 1328.35, 1328.36); T.C.A. (orig. ed.), §§ 67-3045, 67-3046.]

67-6-403. *Forms.*—(a) The commissioner shall design, prepare, print and furnish to all dealers, or make available to the dealers, all necessary forms for filing returns and instructions to insure a full collection from dealers and an accounting for the taxes due, but failure of any dealer to secure such forms shall not relieve such dealer from the payment of the tax at the time and in the manner herein provided.

(b) The cost of preparing and distributing the reports, forms, and paraphernalia for the collection of the tax and the inspection and enforcement duties required herein shall be borne by the revenues produced by this chapter, provisions for which are hereinafter made. [Acts 1947, ch. 3, §§ 13, 14; C. Supp. 1950, §§ 1248.83, 1248.86 (Williams, §§ 1328.35, 1328.36); T.C.A. (orig. ed.), §§ 67-3043, 67-3046.]

67-6-404. *Oaths.*—The commissioner and his assistants are authorized and empowered to administer the oath for the purpose of enforcing and administering the provisions of this chapter. [Acts 1947, ch. 3, § 13; C. Supp. 1950, § 1248.84 (Williams, § 1328.35); T.C.A. (orig. ed.), § 67-3044.]

67-6-405. *Personnel, supplies, and expenses.*—(a) The commissioner with the approval of the governor is authorized to employ all necessary assistance to administer this chapter properly and is also authorized to purchase all necessary supplies and equipment and to incur any other necessary expenses which may be required for this pur-

pose, in order to put the chapter fully and completely into effect.

(b) All necessary expenses of employees to administer this chapter shall be paid in the manner provided by law applicable to expenses of other state officials and employees. [Acts 1947, ch. 3, §§ 14, 17; mod. C. Supp. 1950, §§ 1248.86, 1248.89 (Williams, §§ 1328.36, 1328.39); Acts 1971, ch. 117, § 6; 1976 (Adj. S.), ch. 789, § 1; T.C.A. (orig. ed.) §§ 67-3046, 67-3048.]

67-6-406. *Duties of state and local officials.*—The commissioner is authorized to require the assistance of any official of the state or of any political subdivision thereof in the administration of this chapter and it shall be unlawful for any official of this state or of any political subdivision thereof to accept an application for a certificate of title to a motor vehicle as provided for in chapters 1 through 6 of title 55 or for a certificate of registration for a vessel as provided for in chapter 10 of title 69 unless the applicant shall present evidence that a sales or use tax, as provided for in this chapter, has been paid on the sales price of the vehicle or vessel by such applicant or such applicant has authority from the commissioner of revenue to file an application for such certificate of title or registration without the payment of the sales or use tax. It shall also be unlawful for any official referred to herein to accept an application for a certificate of title to a motor vehicle when the sale of such vehicle constitutes an occasional and isolated sale which is taxable under § 67-6-102 (1) unless the applicant presents a bill of sale which evidences the sale price and also presents evidence that the sales or use tax has been paid on that amount, or in the

absence of such a bill of sale, unless the official requires evidence of payment of the sales or use tax on the fair market value of the vehicle as the same is determined by him by reference to the most recent issue of an authoritative automotive pricing manual, such as the N.A.D.A. Official Used Car Guide, Southeastern Edition. [Acts 1947, ch. 3, § 17; mod. C. Supp. 1950, § 1248.89 (Williams, § 1328.39); Acts 1971, ch. 117, § 6; 1976 (Adj. S.), ch. 789, § 1; T.C.A. (orig. ed.), § 67-3048.]

PART 5—COLLECTION AND ENFORCEMENT GENERALLY

67-6-501. *Tax collected from dealer.*—(a) Every dealer making sales, whether within or outside the state, of tangible personal property, for distribution, storage, use, or other consumption in this state, or furnishing any of the things or services taxable under this chapter, shall be liable for the tax imposed by this chapter.

(b) The tax shall be collected from the dealer as defined herein and paid at the time and in the manner as hereinafter provided.

(c) The aforesaid tax at the rate provided by law of the retail sales price, as of the moment of sale, or of the cost price, as of the moment of purchase, as the case may be, shall be collectible from all persons, as defined in § 67-6-102, engaged as dealers, as defined in § 67-6-102, in the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of tangible personal property, or in the furnishing of any of the things or services taxable under this chapter. [Acts 1947, ch. 3, §§ 3, 4; C. Supp. 1950, §§ 1248.52-1248.54 (Williams, §§ 1328.24, 1328.25); Acts 1955, ch. 51, §§ 7-9, 11;

1955, ch. 242, § 6; 1957, ch. 307, § 1; 1959, ch. 15, § 2; 1963, ch. 38, §§ 3, 5; 1963, ch. 172, § 3; 1965, ch. 335, § 2; 1969, ch. 3, § 1; 1971, ch. 78, § 1; 1971, ch. 117, §§ 2, 3; 1972 (Adj. S.), ch. 653, § 1; 1973, ch. 239, § 1; 1974 (Adj. S.), ch. 675, § 1; 1975, ch. 316, § 1; 1976 (Adj. S.), ch. 466, §§ 1, 3; 1982 (Adj. S.), ch. 610, § 1; 1982 (Adj. S.), ch. 646, § 1; 1983, ch. 378, § 1; 1983, ch. 402, § 1; T.C.A. (orig. ed.), §§ 67-3003, 67-3016, 67-3018.]

67-6-502. *Tax paid by consumer.*—The tax imposed by this chapter shall be collected by the retailer from the consumer insofar as it can be done [Acts 1947, ch. 3, § 5; C. Supp. 1950, § 1248.60 (Williams, § 1328.26); Acts 1955, ch. 51, § 7; 1957, ch. 307, § 2; 1963, ch. 89, § 1; 1969, ch. 3, § 3; 1970 (Adj. S.), ch. 402, § 1; 1971, ch. 117, § 4; T.C.A. (orig. ed.), § 67-3020.]

67-6-503. *Retailer to display price and tax separately.*—The commissioner may by regulation provide that the amount collected by the retailer from the consumer in reimbursement of the tax be displayed separately from the list price, the price advertised in the premises, the marked price, or other price on the sale check or other proof of sale. [Acts 1947, ch. 3, § 5; C. Supp. 1950, § 1248.60 (Williams, § 1328.26); Acts 1955, ch. 51, § 7; 1957, ch. 307, § 2; 1963, ch. 89, § 1; 1969, ch. 3, § 3; 1970 (Adj. S.), ch. 402, § 1; 1971, ch. 117, § 4; T.C.A. (orig. ed.), § 67-3020.]

67-6-504. *Returns and payment.*—(a) The taxes levied under this chapter shall be due and payable monthly on the first day of each month, and for the purpose of ascertaining the amount of tax payable under this chapter it shall be the duty of all dealers on or before the 20th day

of each month to transmit to the commissioner, upon forms prescribed, prepared and furnished by him, returns, showing the gross sales, or purchases, as the case may be, arising from all sales or purchases taxable under this chapter during the preceding calendar month.

(b) At the time of transmitting the return required hereunder to the commissioner, the dealer shall remit to him therewith the amount of tax due under the applicable provisions of this chapter and failure to so remit such tax shall cause the tax to become delinquent.

(c) Gross proceeds from rentals or leases of tangible personal property shall be reported and the tax shall be paid with respect thereto in accordance with such rules and regulations as the commissioner may prescribe.

(d) Gross proceeds from the furnishing of things or services taxable under this chapter shall be reported and the tax shall be paid with respect thereto in the same manner as gross proceeds from the sale, rental or lease of tangible personal property and in accordance with such rules and regulations as the commissioner may prescribe. [Acts 1947, ch. 3, §§ 8, 10; C. Supp. 1950 §§ 1248.64, 1248.75 (Williams, §§ 1328.30, 1328.32); modified; Acts 1955, ch. 51, § 12; T.C.A. (orig. ed.), §§ 67-3022-67-3024.]

67-6-505. *Alternative filing and payment dates.*—The commissioner is specifically authorized to establish by regulation periodic filing and payment dates other than monthly in those instances where he deems it to be in the best interests of the state to do so; provided, however, that in such cases where the average monthly liability is or is indicated to be more than one hundred dollars (\$100), the

commissioner shall require advance deposits in such amount as he deems necessary to protect the state's interests. [Acts 1947, ch. 3, § 8; 1949, ch. 245, § 3; C. Supp. 1950, § 1248.66 (Williams, § 1328.30); Acts 1965, ch. 4, § 1; 1969, ch. 164, §§ 1, 2; 1970 (Adj. S.), ch. 360, § 1; 1977, ch. 64, § 1; 1980 (Adj. S.), ch. 885, § 13; 1983, ch. 238, §§ 1, 2; T.C.A. (orig. ed.), § 67-3026.]

67-6-506. *Extensions.*—The commissioner, under emergency or other extraordinary conditions, may extend for not to exceed thirty (30) days the time for making any returns required under the provisions of this chapter. There shall, however, be added to the amount of tax due, interest, as provided by § 67-1-801, from the regular statutory delinquency date until the date paid. No penalty will be assessed when the return is made and the full amount of taxes paid on or before the extended delinquency date. Any return and payment made subsequent to the extended delinquency date shall, however, be subject to penalty and any other late charges without regard to the period allowed by the extension. [Acts 1947, ch. 3, § 8; 1949, ch. 245, § 3; C. Supp. 1950, § 1248.66 (Williams, § 1328.30); Acts 1965, ch. 4, § 1; 1969, ch. 164, §§ 1, 2; 1970 (Adj. S.), ch. 360, § 1; 1977, ch. 64, § 1; 1980 (Adj. S.), ch. 885, § 13; 1983, ch. 238, §§ 1, 2; T.C.A. (orig. ed.), § 67-3026.]

67-6-507. *Credits to dealer.*—(a) The provisions of this chapter shall not apply in respect to the use or consumption, or distribution, or storage of tangible personal property for use or consumption in this state upon which a like tax equal to or greater than the amount imposed by this chapter has been paid in another state, the proof of payment of such tax to be according to rules and regula-

tions made by the commissioner. If the amount of tax paid in another state is not equal to or greater than the amount of tax imposed by this chapter, then the dealer shall pay to the commissioner an amount sufficient to make the tax paid in the other state and in this state equal to the amount imposed by this chapter.

(b) If the dealer can show by reasonable proof that he has paid any Tennessee sales or use tax to a vendor on personal property or taxable service which such dealer has subsequently sold without collecting tax on the resale of the personal property or taxable service, then the dealer shall be given credit for any such payment in computing any liability to the department of revenue for sales or use tax. Reasonable proof can be supplied by invoices and other records which the dealer may obtain from the vendors from which he has made purchases.

(c) In the event purchases are returned to the dealer by the purchaser or consumer after the tax imposed by this chapter has been collected, or charged to the account of the consumer or user, or if the dealer actually refunds the purchase price and the sales tax thereon, to the purchaser or consumer for any other reason, the dealer shall be entitled to reimbursement of the amount of tax so collected or charged by him, in the manner prescribed by the commissioner; and in case the tax has not been remitted by the dealer to the commissioner, the dealer may deduct the same in submitting his return upon receipt of a signed statement of the dealer as to the gross amount of such refunds during the period covered by said signed statement, which period shall not be longer than ninety (90) days.

(d) In the event a dealer shall sell any article of personal property on a security agreement or other title retained instrument and the dealer shall thereafter be required to repossess or enforce his lien on the article of personal property at a time when the balance due on the unpaid purchase price shall exceed five hundred dollars (\$500), the dealer shall be entitled to a credit on the sales tax which he shall be required to collect and remit to the commissioner in an amount equal to the difference between the amount of the sales tax collected and paid at the time of the original purchase and the amount of sales tax which would be owed on that portion of the purchase price which has actually been paid by the purchaser, plus the sales tax on the first five hundred dollars (\$500) of the unpaid balance of the purchase price. The commissioner shall issue to the dealer an official credit memorandum equal to the net amount remitted by the dealer for such tax collected. Such memorandum shall be accepted by the commissioner at full face value from the dealer to whom it is issued, in the remittance for subsequent taxes accrued under the provisions of this chapter, provided that in cases where a dealer has retired from business and has filed a final return, a refund of tax may be made if it can be established to the satisfaction of the commissioner that the tax was not due.

(e) A dealer who has paid the tax imposed by this chapter on any sale as defined in § 67-6-102 may take credit in any return filed under the provisions of this chapter for the tax paid by him on the unpaid balance due on accounts which during the period covered by the current return have been found to be worthless and are actually charged off for federal income tax purposes, provided,

that if any accounts so charged off are thereafter in whole or in part paid to the dealer, the amount so paid shall be included in the first return filed after such collection and the tax paid accordingly. [Acts 1947, ch. 3, §§ 4, 8, 13; C. Supp. 1950, §§ 1248.57, 1248.67, 1248.82 (Williams, §§ 1328.25, 1328.30, 1328.35); Acts 1957, ch. 63, § 1; 1965, ch. 285, § 1; 1965, ch. 358, § 1; 1967, ch. 117, § 2; 1974 (Adj. S.), ch. 798, § 1; 1983, ch. 46, § 1; T.C.A. (orig. ed.), §§ 67-3008, 67-3028; 67-3029.]

67-6-508. Credits to purchaser.—The most recent bona fide purchaser for value of a motor vehicle that is seized by an authorized law enforcement official under the provisions of part 1, chapter 5 of title 55, or any other similar provision of law respecting stolen motor vehicles, shall if such vehicle is not ultimately returned to the purchaser, be entitled to a full refund of any Tennessee use tax, if the purchaser paid such tax to the appropriate governmental official pursuant to § 55-3-105. Any claim for refund under this section shall be filed with the commissioner, together with satisfactory proof that the use tax has been properly paid to the commissioner, in the manner provided in § 67-1-707. [Acts 1983, ch. 46, § 1; T.C.A. § 67-3028.]

67-6-509. Deduction for dealer's accounting costs.—
(a) For the purpose of compensating the dealer in accounting for and remitting the tax, a dealer shall be allowed a deduction of tax due, reported, and paid to the department as follows:

(1) Two percent (2%) of the first two thousand dollars (\$2,000) on each report; and

(2) One and one-half percent ($1\frac{1}{2}\%$) of amounts over two thousand dollars (\$2,000) on each report.

(b) Beginning July 1, 1985, and thereafter, for the purpose of compensating the dealer in accounting for and remitting the tax levied by this chapter, a dealer shall be allowed a deduction of tax due, reported, and paid to the department of two percent (2%) on each report.

(c) No deduction from tax shall be allowed if any such report or payment of tax is delinquent. [Acts 1947, ch. 3, § 8; C. Supp. 1950, § 1248.65 (Williams, § 1328.30; Acts 1980 (Adj. S.), ch. 594, § 1; 1980 (Adj. S.), ch. 871, § 3; T.C.A. (orig. ed.), § 67-3021.]

67-6-510. *Computation on trade-ins.*—Where used articles are taken in trade, or in a series of trades, as a credit or part payment on the sale of new or used articles, the tax levied by this chapter shall be paid on the net difference, that is, the price of the new or used article sold less the credit for the used article taken in trade. [Acts 1947, ch. 3, subsec. 6; mod. C. Supp. 1950, § 1248.62 (Williams, § 1328.28); T.C.A. (orig. ed), § 67-3015.]

67-6-511. *Inclusion of lessee's sales in dealers return.*—When any person to whom a “certificate of registration” has been issued under this chapter leases certain departments in his place of business to other persons for the purpose of making sales at retail of tangible personal property or taxable services to consumers and keeps the records and makes and accounts for the collection of the leased department's sales, he may include the sales made by such leased departments in his own tax return and remit the tax due thereon. Provided, however, that in such in-

stances a lessor shall be deemed to be an agent of the lessee and the lessee shall not be relieved of any of his liabilities under this chapter if the lessor defaults therein. [Acts 1947, ch. 3, § 16; C. Supp. 1950, § 1248.88 (Williams, § 1328.38); Acts 1951, ch. 168, § 1; 1955, ch. 51, § 14; 1955, ch. 242, § 9; 1961, ch. 136, § 1; 1963, ch. 92, § 1; 1969, ch. 109, § 1; 1971, ch. 55, § 1; 1971, ch. 92, § 1; 1971, ch. 186, § 1; T.C.A. (orig. ed.), § 67-3041.]

67-6-512. *Form of payment.*—All taxes, interest and penalties imposed under this chapter shall be paid to the commissioner at Nashville in the form of remittance required by him. The use of tokens is forbidden and prohibited. [Acts 1947, ch. 3, §§ 10, 14; C. Supp. 1950, §§ 1248.76, 1248.86 (Williams, §§ 1328.32, 1328.36); T.C.A. (orig. ed.), §§ 67-3027, 67-3046.]

67-6-513. *Settlement on quitting business.*—(a) If any dealer liable for any tax, interest or penalty levied hereunder shall sell out his business or stock of goods, or shall quit the business, he shall make a final return and payment within fifteen (15) days after the date of selling or quitting the business. His successor, successors, or assigns, if any, shall withhold sufficient of the purchase money to cover the amount of such taxes, interest, and penalties due and unpaid until the former owner shall produce a receipt from the commissioner showing that they have been paid, or a certificate stating that no taxes, interest, or penalties are due. If the purchaser of a business or stock of goods shall fail to withhold the purchase money as above provided, he shall be personally liable for the payment of the taxes, interest, and penalties accruing and unpaid on account of the operation of the business by any former owner, owners, or assigns.

(b) Any violation of the provisions of this section shall be a misdemeanor and punishable as such. [Acts 1947, ch. 3, § 7; C. Supp. 1950, § 1248.63 (Williams, § 1328.29); T.C.A. (orig. ed.), § 67-3025.]

67-6-514. *Excess revenue paid over to commissioner.*—When the tax collected for any period is in excess of that provided by law the total tax collected shall be paid over to the commissioner, less any compensation allowed to the dealer as hereinafter set forth. This provision shall be construed with other provisions of this chapter and given effect so as to result in the payment to the commissioner of the total tax collected if in excess of that provided by law. [Acts 1947, ch. 3, § 5; C. Supp. 1950, § 1248.60 (Williams, § 1328.26); Acts 1955, ch. 51, § 7; 1957, ch. 307, § 2; 1963, ch. 89, § 1; 1969, ch. 3, § 3; 1970 (Adj. S.), ch. 402, § 1; 1971, ch. 117, § 4; T.C.A. (orig. ed.), § 67-3020.]

67-6-515. *When tax becomes delinquent.*—The tax imposed by this chapter shall for each month become delinquent on the twenty-first day of each succeeding month. [Acts 1947, ch. 3, § 11; C. Supp. 1950, § 1248.78 (Williams, § 1328.33); Acts 1955, ch. 242, § 5; impl. am. Acts 1959, ch. 9, § 14; Acts 1971, ch. 285, § 2; T.C.A. (orig. ed.), § 67-3033.]

67-6-516. *Delinquency—Penalties and interest.*—(a) When any dealer shall fail to make any return and pay the full amount of the tax required by this chapter there shall be imposed, in addition to other penalties provided herein, a specific penalty to be added to the tax in the amount of five percent (5%), if the failure is for not more than thirty (30) days with an additional five percent (5%),

for each additional thirty (30) days, or fraction thereof, during which the failure continues, not to exceed twenty-five percent (25%) in the aggregate. In the case of a false or fraudulent return, where willful intent exists to defraud the state of any tax due under this chapter, a specific penalty of fifty percent (50%) of the tax shall be assessed. Provided, however, where a return is delinquent at the time it is filed or becomes delinquent, the minimum penalty may be five dollars (\$5.00), regardless of the amount of tax due or whether there is any tax due.

(b) When an examination of a dealer's books and records indicates that the dealer is deficient in paying the proper tax due for a month, but has paid more tax than is actually due for another month, or is deficient in paying the proper tax on one or more transactions within a month, but has paid more tax than is actually due on other transactions during the same month, or has erroneously paid tax to another dealer, the overpayment or erroneous payment shall be applied to the deficiency before computing any penalty and interest due as a result of such examination, the earliest overpayments offsetting the earliest underpayments for this purpose, and the penalty, if any, being computed on the amounts of underpayments not offset by overpayments.

(c) All penalties and interest imposed by this chapter shall be payable to and collectible by the commissioner in the same manner as if they were a part of the tax imposed. [Acts 1947, ch. 3, § 8; 1949, ch. 245, § 3; C. Supp. 1950, § 1248.66 (Williams, § 1328.30); Acts 1965, ch. 4, § 1; 1969, ch. 164, §§ 1, 2; 1970 (Adj. S.), ch. 360, § 1; 1977, ch. 64, § 1; 1980 (Adj. S.), ch. 885, § 13; 1983, ch. 238, §§ 1, 2; T.C.A. (orig. ed.), § 6-67-3026.]

67-6-517. *Delinquency—Determination and collection tax.*— (a) In the event any dealer fails to make a report and pay the tax as provided by this chapter, or in case any dealer makes a grossly incorrect report, or a report that is false or fraudulent it shall be the duty of the commissioner to make an estimate for the taxable period of retail sales of such dealer, or of the gross proceeds for rentals or leases of tangible personal property by the dealer, estimating the cost price of all articles of tangible personal property imported by the dealer for use or consumption or distribution or storage to be used or consumed in this state, and assess and collect the tax and interest, plus penalty, if such have accrued, on the basis of such assessment, which shall be considered prima facie correct, and the burden to show the contrary shall rest upon the dealer.

(b) If any dealer subject to make and file a return required by any provision of this chapter fails to render such return within the time required or renders a return which is false or fraudulent in that it contains statements which differ from the true gross sales, purchases, leases, or rentals taxable under this chapter or otherwise fails to comply with the provisions of this chapter for the taxable period for which said return is made, the commissioner shall give the dealer ten (10) days' notice in writing requiring the dealer to appear before him or his assistant with such books, records, and papers as he may require relating to the business of the dealer for such taxable period; and said commissioner may require the dealer or the agents and employees of such dealer to give testimony or to answer interrogatories under oath administered by the commissioner or his assistants respecting the sale at retail, the use, consumption, or distribution, or storage for

use or consumption in this state or lease or rental of tangible personal property subject to tax or the failure to make report thereof as provided in this chapter.

(c) If any dealer fails to make any such return or refuses to permit an examination of his books, records or papers, or to appear and answer questions within the scope of such investigation relating to the sale, use, consumption, distribution, storage, lease, or rental of tangible personal property, the commissioner is authorized to make an assessment based upon such information as may be available to him and to issue a distress warrant for the collection of any such taxes, interest or penalties found to be due. Any such assessment shall be deemed *prima facie* correct.

(d) In the event the dealer has imported the tangible personal property and he fails to produce an invoice showing the cost price of the articles as defined in this chapter, which are subject to tax, or the invoice does not reflect the true or actual cost price as defined herein, then the commissioner shall ascertain, in any manner feasible, the true cost price, and assess and collect the tax with interest plus penalties, if such have accrued on the true cost price as assessed by him; the assessment so made shall be considered *prima facie* correct, and the duty shall be on the dealer to show the contrary.

(e) In the case of the lease or rental of tangible personal property, if the consideration given or reported by the dealer does not, in the judgment of the commissioner, represent the true or actual consideration, then the commissioner is authorized to fix the same and collect the tax thereon in the same manner as above provided, with

interest plus penalties, if such have accrued. [Acts 1947, ch. 3, §§ 8, 10; C. Supp. 1950, §§ 1248.67, 1248.69, 1248.70, 1248.74 (Williams, §§ 1328.30, 1328.32); Acts 1965, ch. 285, § 1; T.C.A. (orig. ed.), §§ 67-3029—67-3032.]

67-5-518. *Collection of tax from dealer's debtors.*—

(a) In the event any dealer is delinquent in the payment of the tax herein provided for the commissioner may give notice of the amount of such delinquency by registered mail to all persons having in their possession or under their control any credits or other personal property belonging to such dealer, or owing any debts to such dealer at the time of receipt by them of such notice, and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property, or debts, until the commissioner shall have consented to a transfer or disposition, or until thirty (30) days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five (5) days after receipt of such notice, advise the commissioner of any and all such credits, other personal property, or debts, in their possession, under their control, or owing by them, as the case may be.

(b) Any violation of the provisions of this section shall be a misdemeanor and punishable as such. [Acts 1947, ch. 3 § 7; C. Supp. 1950, § 1248.63 (Williams, § 1328.29); T.C.A. (orig. ed.), § 67-3025.]

67-6-519. *Lien for taxes.*—(a) The tax herein levied shall be a lien upon all the property of the dealer against whom the same is assessed located in this state and shall be inferior only to state and county ad valorem taxes and to existing liens created by contracts, but it shall be superior to any renewals of existing contract liens.

(b) It shall be the responsibility of the department of revenue to file and have recorded a notice of such lien in the office of the county register of deeds in the county or counties where such property is located, and it shall be the duty of the county register to record notice of such lien in the same manner as other liens are filed in his office; such tax lien shall not be superior to any recorded lien except those subsequently placed of record.

(c) There shall be no fees collected by the county register at the time the notice of such a lien is recorded but he shall extend credit to the department of revenue for such recording fees as are chargeable and submit his bill at the end of each month to the director of the division submitting such notice of lien for recordation in order to obtain payment. [Acts 1947, ch. 3, § 11; C. Supp. 1950, § 1248.78 (Williams, § 1328.33); Acts 1955, ch. 242, § 5; impl. am. Acts 1959, ch. 9, § 14; Acts 1971, ch. 285, § 2; T.C.A. (orig. ed.), § 67-3033.]

67-6-520. *Distress warrants.*—(a) The commissioner of revenue is empowered and it shall be his duty when any tax becomes delinquent under this chapter to issue a distress warrant for the collection of the tax, interest, and penalty from each delinquent taxpayer.

(b) The distress warrant may be addressed and delivered to the sheriff of the county wherein such delinquent taxpayer resides, or has his principal office or place of business, or to the sheriff of any county in which the commissioner has reason to believe property of such delinquent taxpayer may be found.

(c) The sheriff into whose hands such warrant may come, or his deputy, may execute same by the distraint and

sale of personal property belonging to the taxpayer and the proceedings in respect thereto shall be the same as are provided by law for proceedings under an execution at law from a court of record; and the executing officer shall be entitled to the same fees, commissions, and necessary expense of removing and keeping property distrained as in case of an execution from a court of record.

(d) If the officer cannot find any personal property to satisfy the distress warrant, he may levy same upon any real estate in his county belonging to such delinquent taxpayer; and if levied on land, the distress warrant together with the officer's return thereon shall be returned to the circuit court of the county wherein the land lies and the land shall be condemned and sold under the orders of the circuit court in the same manner as in case of the levy on land of an execution issued by a court of general sessions.

(e) Distress warrants issued for the collection of the tax imposed by this chapter may, in the discretion of the commissioner of revenue, be addressed and delivered to an employee or representative of the department of revenue for purposes of execution, and such employee or representative shall have the same powers and authority as a sheriff for the purposes of levying and executing any distress warrants so issued. Such employee or representative shall be entitled to the same fees and costs as would accrue to a sheriff for such services, which fees and costs shall be paid to the department of revenue and deposited in the general fund of the state treasury. [Acts 1947, ch. 3, § 11; C. Supp. 1950, § 1248.78 (Williams, § 1328.33); Acts 1955, ch. 242, § 5; impl. am. Acts 1959, ch. 9; § 14; Acts 1971, ch. 285, § 2; T.C.A. (orig. ed.), § 67-3033.]

67-6-521. *Injunctions.*—The commissioner, with the approval of the attorney general, may file and maintain injunctive proceedings against any dealer who is delinquent or in default under this chapter to enjoin such dealer from doing business during such delinquency or default. [Acts 1947, ch. 3, § 11; C. Supp. 1950, § 1248.78 (Williams, § 1328.33); Acts 1955, ch. 242, § 5; impl. am. Acts 1959, ch. 9, § 14; Acts 1971, ch. 285, § 2; T.C.A. (orig. ed.), § 67-3033.]

67-6-522. *Delinquent dealers — Bond.*— (a) Every dealer licensed to do business in the state of Tennessee who shall become delinquent for more than ninety (90) days in the payment of any sales or use taxes due the state shall, upon notice from the commissioner, post with the commissioner cash or an indemnity bond with good and solvent surety, approved by him, in an amount equal to three (3) times the average monthly sales tax liability or use tax liability of the dealer, conditioned upon the proper payment of retail sales taxes or use taxes for which such dealer may become liable; provided, further, that in the event that any dealer who may become subject to the provisions of this subsection shall fail to post the cash or surety bond, the dealer shall be subject to revocation of any one (1) or more of the certificates of registration held by him as provided by part 6 of this chapter. The bond provided for herein shall run for such time as may be determined by the commissioner.

(b) The commissioner may, in his discretion, require any dealer who has been found in default under this chapter, to execute and file with the department a good-faith bond, with surety approved by the commissioner, in an amount double the defaulted liability, which bond shall

be kept on file with the department and remain in effect such period of time after such default as may be required by the commissioner. ([Acts 1947, ch. 3, §§ 5, 11; C. Supp. 1950, §§ 1248.60, 1248.78 (Williams, §§ 1328.26, 1328.33); Acts 1955, ch. 51, § 7; 1955, ch. 242, § 5; 1957, ch. 307, § 2; impl. am. Acts 1959, ch. 9, § 14; 1963, ch. 89, § 1; 1969, ch. 3, § 3; 1970 (Adj. S.), ch. 402, § 1; 1971, ch. 117, § 4; 1971, ch. 285, § 2; T.C.A. (orig. ed.), §§ 67-3020, 67-3033.]

67-6-523. *Records.*—(a) It shall be the duty of every dealer required to make a report and pay any tax under this chapter, to keep and preserve suitable records of the sales or purchases, as the case may be, taxable under this chapter, and such other books of account as may be necessary to determine the amount of tax due hereunder, and other information as may be required by the commissioner, and it shall be the duty of every such dealer, moreover, to keep and preserve, for a period of three (3) years, all invoices and other records of goods, wares and merchandise, or other subjects of taxation under this chapter; and all such books, invoices, and other records shall be open to examination at all reasonable hours to the commissioner or any of his authorized agents.

(b) Each dealer, as defined in this chapter, shall secure, maintain, and keep for a period of three (3) years a complete record of tangible personal property received, used, sold at retail, distributed or stored, leased, or rented within this state by the dealer together with invoices, bills of lading, and other pertinent records and papers as may be required by the commissioner for the reasonable administration of this chapter, and all such records shall be open for inspection to the commissioner at all reasonable hours. Any dealer subject to the provisions of this chapter

who shall violate the provisions of this subsection shall be guilty of a misdemeanor and upon conviction shall be punished as provided by the general law.

(c) In order to aid in the administration and enforcement of the provisions of this chapter, and collect all of the tax imposed by this chapter, all wholesale dealers and jobbers in this state are required to keep a record of all sales of tangible personal property made in this state, whether such sales be for cash or on terms of credit. The record required to be kept by all wholesale dealers and jobbers shall contain and include the name and address of the purchaser, the date of the purchase, the article purchased, and the price at which the article is sold to the purchaser. These records shall be kept for a period of three (3) years and shall be open to the inspection of the commissioner, or his duly authorized assistants, at all reasonable hours. The failure of any wholesale dealer or jobber in this state to keep such records, or the failure of any wholesale dealer or jobber in this state to permit an inspection of such records by the commissioner as aforesaid, shall be deemed a misdemeanor and upon conviction thereof the wholesale dealer or jobber shall be subject to a fine of not less than fifty dollars (\$50.00) nor more than two hundred dollars (\$200), or imprisonment in the county jail for not less than ten (10) days nor more than thirty (30) days, or both, for the first offense, and for the second or each subsequent offense the penalty shall be double.

(d) For the purpose of enforcing the collection of the tax levied by this chapter the commissioner is specifically authorized and empowered to examine at all reasonable hours the books, records, and other documents of all transportation companies, agencies or firms that conduct

their business by truck, rail, water, airplane, or otherwise, in order to determine what dealers, as provided in this chapter, are importing or are otherwise shipping articles of tangible personal property which are liable for the tax. In the event the transportation company, agency or firm shall refuse to permit such examination of its books, records, and other documents by the commissioner, as aforesaid, it shall be deemed guilty of a misdemeanor punishable by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500); provided further, that the commissioner shall have the right to proceed in the chancery court for a mandatory injunction or other appropriate remedy to enforce his right, as granted by this section, to an examination of the books and records of transportation companies. [Acts 1947, ch. 3, §§ 8, 9; C. Supp. 1950, §§ 1248.68, 1248.71-1248.73 (Williams, §§ 1328.30, 1328.31); Acts 1955, ch. 242, §§ 2-4; T.C.A. (orig. ed.), §§ 67-3034—67-3037.]

67-6-524. *Importation permits.*—(a) In order to prevent the illegal importation of tangible personal property which is subject to tax in this state, and to strengthen and make more effective the manner and method of enforcing payment of the tax imposed by this chapter, the commissioner is authorized and empowered to put into operation a system of permits whereby any person or dealer as defined in this chapter may import tangible personal property by truck, automobile, or other means of transportation other than a common carrier, without having the truck, automobile, or other means of transportation seized and subjected to legal proceedings for its forfeiture. Such system of permits shall require the person or dealer who desires to import tangible personal property into this

state, which property is subject to tax imposed by this chapter, to apply to the commissioner or his assistant for a permit stating the kind of vehicle to be used, the name of the driver, the license number of the vehicle, the kind or character of tangible personal property to be imported, the date, the name and address of the consignee and such other information as the commissioner may deem proper or necessary to prevent the illegal transportation of tangible personal property into this state. Such permit shall be free of cost to the applicant and may be obtained from the department of revenue or any of its branch offices.

(b) The importation into this state of tangible personal property which is subject to tax, by truck, automobile or other means of transportation other than a common carrier, without first obtaining a permit as described hereinbefore (if the tax imposed by this chapter on the tangible personal property has not been paid), shall be construed as an attempt to evade payment of the tax and the same is prohibited and the truck, automobile or means of transportation other than a common carrier, and the taxable property may be seized by the commissioner in order to secure the same as evidence in a trial and the same shall be subject to forfeiture and sale in the manner provided for in this chapter. [Acts 1947, ch. 3, § 12; C. Supp. 1950, §§ 1248.79, 1248.80 (Williams, § 1328.34); impl. am. Acts 1959, ch. 9, § 14; T.C.A. (orig. ed.), §§ 67-3038, 67-3039.]

67-6-525. *Illegal importation—Confiscation of property.*—(a) Any truck, automobile, or other means of transportation other than a common carrier which is used to import into this state tangible personal property which is subject to tax under this chapter, together with the con-

tents thereof, is declared to be contraband and subject to confiscation unless a permit as hereinabove described was first obtained. The commissioner shall confiscate any such truck, automobile, or other means of transportation other than a common carrier together with its contents whenever the same is found to be importing without permit tangible personal property, the sale or use of which is taxable under this chapter.

(b) Upon seizure for confiscation the commissioner or his representatives shall appraise the value of the vehicle and its contents according to his best judgment and shall deliver to the person, if any, found in possession of such property, a receipt showing the fact of seizure, from whom seized, the place of seizure, a description of the vehicle and contents seized. A copy of the receipt shall be filed in the office of the department of revenue and shall be open to public inspection.

(c) The commissioner or any representative of the department of revenue shall within five (5) days advertise the vehicle and its contents or other property so seized for sale to the highest bidder by one (1) proper notice in a newspaper published in the county where the property is to be sold, if the county has such newspaper; if no newspaper, then by a notice on the courthouse door at least five (5) days prior to the date of sale, containing a description of the vehicle and property to be sold.

(d) Any person claiming any property so seized as contraband goods may, at any time before the sale, file with the commissioner at Nashville a claim in writing requesting a hearing and stating his interest in the articles seized. The commissioner shall set a date for

hearing within ten (10) days from the day the claim is filed. The commissioner is empowered to subpoena witnesses and compel their attendance at the hearing authorized under this chapter. All parties to the proceeding including the person claiming such property shall have the right to have subpoenas issued by the commissioner to compel the attendance of all witnesses deemed by such parties to be necessary for a full and complete hearing. All witnesses shall be entitled to the witness fees and mileage provided by law for legal witnesses, which fees and mileage shall be paid as a part of the cost of the proceeding.

(e) In the event the ruling of the commissioner is favorable to the claimant the commissioner shall deliver to the claimant the vehicle or property so seized. If the ruling of the commissioner is adverse to the claimant the commissioner shall proceed to sell such contraband goods in accordance with the foregoing provisions of this chapter.

(f) The expense of storage, transportation, etc., shall be adjudged as a part of the cost of the proceeding in such manner as the commissioner shall fix pending any proceeding to recover a vehicle or other property seized under this chapter.

(g) The commissioner may order delivery thereof to any claimant who shall establish his right to immediate possession thereof and who shall execute with one or more sureties, approved by the commissioner, and deliver to the commissioner a bond in favor of the state of Tennessee for the payment of a sum double the appraised value thereof as of the time of the hearing; and contain-

ing the further provision that if the vehicle or other property is not returned at the time of the hearing the bond shall stand in lien of and be forfeited in the same manner as such vehicle or other property.

(h) The action of the commissioner may be reviewed by a petition for common law writ of certiorari addressed to the circuit court of Davidson County, which petition shall be filed within ten (10) days from the date the order of the commissioner is made.

(i) Immediately upon the granting of the writ of certiorari the commissioner shall cause to be made, certified, and forwarded to the court a complete transcript of the proceeding in the cause which shall contain all the proofs submitted before the commissioner. All defendants named in the petition desiring to make defense shall answer or otherwise plead to the petition within ten (10) days from the date of the filing of the transcript unless the time be extended by the court.

(j) The decision of the commissioner shall be reviewed by the circuit court solely upon the pleadings, and a transcript of the evidence before the commissioner, and neither party shall be entitled to introduce any additional evidence in the circuit court. The confiscated vehicle or goods shall not be sold pending such review but shall be stored by the commissioner until the final disposition of the case.

(k) Within the discretion of the commissioner the claimant may be awarded possession of the confiscated goods pending the decision of the circuit court under the petition for certiorari, provided the claimant shall be required to execute a bond payable to the state of Ten-

nessee in an amount double the value of the property seized, the sureties to be approved by the commissioner. The condition of the bond shall be that the obligors shall pay to the state the full value of the vehicle or goods seized unless upon certiorari the decision of the commissioner shall be reversed and the property awarded to the claimant.

(l) If no claim is interposed, such vehicle or other goods shall be forfeited without further proceedings and the same sold as hereinabove provided. The above procedure is the sole remedy of any claimant and no court shall have jurisdiction to interfere therewith by replevin, injunction, supersedeas, or in any other manner.

(m) Any funds derived from the sale of confiscated vehicles or other goods shall be distributed or allocated in the same manner as other funds derived from this chapter. [Acts 1947, ch. 3, § 12; C. Supp. 1950, § 1248.81 (Williams, § 1328.34); impl. am. Acts 1959, ch. 9, § 14; T.C.A. (orig. ed.), § 67-3040.]

67-6-526. *Violations—Criminal penalties.*—(a) Any dealer subject to the provisions of this chapter failing or refusing to furnish any return herein required to be made or failing or refusing to furnish a supplemental return or other data required by the commissioner, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding two hundred dollars (\$200) or be imprisoned in the county jail not exceeding sixty (60) days, or shall be punished by both fine and imprisonment in the discretion of the court for any such offense.

(b) Any dealer required to make, render, sign, or verify any return as aforesaid who makes a false or fraud-

ulent return with intent to evade the tax hereby levied shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars (\$100) nor more than three hundred dollars (\$300) or be imprisoned in the county jail not less than thirty (30) days nor more than three (3) months, or shall be punished by both fine and imprisonment in the discretion of the court.

(c) Any dealer who shall violate any other provision of this chapter, punishment for which is not otherwise herein provided, shall be guilty of a misdemeanor and upon conviction thereof shall be fined in the sum of not less than ten dollars (\$10.00), nor more than one hundred dollars (\$100) or imprisoned in the county jail for a period of not less than ten (10) days nor more than thirty (30) days or both fine and imprisonment at the discretion of the court. For a second or subsequent offense the penalty shall be double. [Acts 1947, ch. 3, § 10; C. Supp. 1950, § 1248.77 (Williams, § 1328.32); T.C.A. (orig. ed.), § 67-3042.]

67-6-527. *Taxpayer's remedies.*—Upon any claim of illegal assessment and collection the taxpayer shall have his remedy under §§ 67-1-901—67-1-910, and also shall be allowed to file claims for refund in the manner authorized by the general law. [Acts 1947, ch. 3, § 11; C. Supp. 1950, § 1248.78 (Williams, § 1328.33); Acts 1955, ch. 242, § 5; impl. am. Acts 1959, ch. 9, § 14; Acts 1971, ch. 285, § 2; T.C.A. (orig. ed.), § 67-3033.]

PART 6—DEALER REGISTRATION

67-6-601. *Registration required.*—(a) Every person desiring to engage in or conduct business as a dealer in

this state shall file with the commissioner an application for a "certificate of registration" for each place of business.

(b) Any person who engages in the business of furnishing any of the things or services taxable under this chapter shall likewise apply for and obtain a certificate of registration as provided by this part. [Acts 1947, ch. 3, § 16, C. Supp. 1950, § 1248.88 (Williams, § 1328.38); Acts 1951, ch. 168, § 1; 1955, ch. 51, § 14; 1955, ch. 242, § 9; 1961, ch. 136, § 1; 1963, ch. 92, § 1; 1969, ch. 109, § 1; 1971, ch. 55, § 1; 1971, ch. 92, § 1; 1971, ch. 186, § 1; T.C.A. (orig. ed.), § 67-3041.]

67-6-602. — *Certificate of registration.*—(a) Every application for a certificate of registration shall be made upon a form prescribed by the commissioner and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the commissioner may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority.

(b) When the required application has been made the commissioner shall issue to each applicant a separate certificate of registration for each place of business within the state; provided, however, no certificate of registration shall be issued to any person who has been engaged in business in this state, and who has not made a complete

return and payment as provided for in § 67-6-513, or who is delinquent in the payment of any sales or use tax due this state. A certificate of registration is not assignable and is valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall at all times be conspicuously displayed at the place for which issued.

(c)(1) The commissioner may refuse to issue any such registration certificate for any place of business where there is reasonable cause to believe there exists a continuity of business enterprise or resumption of a discontinued one involving a transfer of a business and/or a stock of goods in the same or a different location between members of a family, between relatives by blood or marriage, between employer and employee, or former employee, from a partnership or proprietorship to a corporation, or vice versa, where all or some of the persons involved are the same, or that there otherwise exists a conspiracy to defeat the enforcement of this chapter, in the event the transferor is delinquent in the payment of the tax herein provided.

(2) Such refusal may be continued until such time as the transferor shall have complied with the requirements of § 67-6-513 hereof and with all pertinent provisions of this chapter and rules and regulations of the commissioner promulgated hereunder or until full and complete explanatory information requested by the commissioner has been furnished.

(3) Any person aggrieved by such refusal or by the denial of a certificate for reasons stated in the preceding paragraph may, within ten (10) days after written notice

thereof has been mailed or delivered to him, apply to the commissioner for a hearing setting forth in such application a full statement of the grounds on which he intends to rely; provided, that he has filed with the commissioner, at the time of making such application, a surety company bond running to the state in such sum as the commissioner may determine to be appropriate under the circumstances, conditioned upon the payment of all taxes then due and to become due during the pendency of such appeal to the commissioner and during any further judicial appeal.

(4) When such bond is filed the commissioner shall immediately issue such registration certificate.

(5) After such hearing the commissioner shall give written notice of his decision.

(6) In the event of an adverse determination by the commissioner under the provisions of this or the preceding paragraph an appeal therefrom may be made to any court having jurisdiction within ten (10) days after such written notice has been mailed or delivered to him. [Acts 1947, ch. 3, § 16; C. Supp. 1950, § 1248.88 (Williams, § 1328.38); Acts 1951, ch. 168, § 1; 1955, ch. 51, § 14; 1955, ch. 242, § 9; 1961, ch. 136, § 1; 1963, ch. 92, § 1; 1969, ch. 109, § 1; 1971, ch. 55, § 1; 1971, ch. 92, § 1; 1971, ch. 186, § 1; T.C.A. (orig. ed.), § 67-3041.]

67-6-603. *Forfeiture of certificate.*—Any person violating the provisions of this part shall forfeit the certificate of registration which shall be revoked in accordance with the provisions of this chapter, and such person shall not be entitled to register under this chapter for a period of twelve (12) months after the revocation shall have become

final. [Acts 1947, ch. 3, § 16; C. Supp. 1950, § 1248.88 (Williams, § 1328.38); Acts 1951, ch. 168, § 1; 1955, ch. 51, § 14; 1955, ch. 242, § 9; 1961, ch. 136, § 1; 1963, ch. 92, § 1; 1969, ch. 109, § 1; 1971, ch. 55, § 1; 1971, ch. 92, § 1; 1971, ch. 186, § 1; T.C.A. (orig. ed.), § 67-3041.]

67-6-604. *Revocation of certificate—Procedure.*—Whenever any person fails to comply with any provision of this chapter or any rule or regulation of the commissioner relating thereto, the commissioner, upon hearing, after giving the person ten (10) days' notice in writing, specifying the time and place of a hearing and requiring him to show cause why his certificate of registration should not be revoked, may revoke or suspend any one (1) or more of the certificates of registration held by the person. The notice may be served personally or by certified mail directed to the last known address of the person. The commissioner may designate a hearing officer from the department of revenue to conduct the hearings provided for in this section, who shall make findings of fact, conclusions of law, and proposed orders based thereon. If the commissioner concurs, he shall issue the order; or he may, upon review of the record, make such findings, conclusions, and issue such orders as, in his discretion, the record justifies. [Acts 1947, ch. 3, § 16; C. Supp. 1950, § 1248.88 (Williams, § 1328.38); Acts 1951, ch. 168, § 1; 1955, ch. 51, § 14; 1955, ch. 242, § 9; 1961, ch. 136, § 1; 1963, ch. 92, § 1; 1969, ch. 109, § 1; 1971, ch. 55, § 1; 1971, ch. 92, § 1; 1971, ch. 186, § 1; T.C.A. (orig. ed.), § 67-3041.]

67-6-605. *Recall of certificate for excessive administrative costs.*—The commissioner may, in his discretion, on the basis of adequate past experience, recall any certifi-

cate of registration where, in his judgment, the cost of administering the account is disproportionately high as compared to the amount of tax which a taxpayer is remitting or will remit. Such recall shall be reviewable by a petition for a common law writ of certiorari in the chancery court of Davidson County, which petition shall be filed within ten (10) days from the date of such recall. [Acts 1947, ch. 3, § 16; C. Supp. 1950, § 1248.88 (Williams, § 1328.38); Acts 1951, ch. 168, § 1; 1955, ch. 51, § 14; 1955, ch. 242, § 9; 1961, ch. 136, § 1; 1963, ch. 92, § 1; 1969, ch. 109, § 1; 1971, ch. 55, § 1; 1971, ch. 92, § 1; 1971, ch. 186, § 1; T.C.A. (orig. ed.), § 67-3041.]

67-6-606. *Operating without certificate—Misdemeanor.*—(a) It shall be a misdemeanor for any dealer as herein defined to engage in business without a proper and valid certificate of registration.

(b) Any person who engages in business as a dealer in this state without a certificate of registration after a certificate of registration has been suspended or revoked, and each officer of any corporation which so engages in business shall be guilty of a misdemeanor and punishable as provided by the general law. [Acts 1947, ch. 3, § 16; C. Supp. 1950, § 1248.88 (Williams, § 1328.38); Acts 1951, ch. 168, § 1; 1955, ch. 51, § 14; 1955, ch. 242, § 9; 1961, ch. 136, § 1; 1963, ch. 92, § 1; 1969, ch. 109, § 1; 1971, ch. 55, § 1; 1971, ch. 92, § 1; 1971, ch. 186, § 1; T.C.A. (orig. ed.), § 67-3041.]

67-6-607. *Unauthorized use of certificate—Misdemeanor.*—(a) It shall be a misdemeanor, and punishable as such, for any person having a certificate of registration to use the same for the purpose of purchasing tangible per-

sonal property subject to the tax herein levied except for resale, unless authorized so to do by other provisions of this chapter and the rules and regulations adopted pursuant thereto.

(b) It shall be a misdemeanor for any person who has a certificate of registration to use or consume any tangible personal property purchased or otherwise acquired under the certificate of registration and subject to the privilege taxes herein levied, without paying the privilege taxes. [Acts 1947, ch. 3, § 16; C. Supp. 1950, § 1248.88 (Williams, § 1328.38); Acts 1951, ch. 168, § 1; 1955, ch. 51, § 14; 1955, ch. 242, § 9; 1961, ch. 136, § 1; 1963, ch. 92, § 1; 1969, ch. 109, § 1; 1971, ch. 55, § 1; 1971, ch. 186, § 1; T.C.A. (orig. ed.), § 67-3041.]

PART 7—LOCAL OPTION REVENUE ACT

67-6-701. *Short title—Nature of tax.*—(a) This part shall be known and may be cited as the “1963 Local Option Revenue Act.”

(b) The tax authorized by this part is and shall be in addition to all other taxes which counties, cities and towns are now authorized to levy, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to all other fees and taxes now authorized to be levied. [Acts 1963, ch. 329, §§ 1, 8; T.C.A., §§ 67-3049, 67-3056.]

67-6-702. *Tax authorized—Rates.*—(a)(1) Any county by resolution of its county legislative body or any incorporated city or town by ordinance of its governing body is authorized to levy a tax on the same privileges subject

to this chapter as the same may be amended, which are exercised within such county, city or town, to be levied and collected in the same manner and on all such privileges but not to exceed one half ($\frac{1}{2}$) of the rates levied therein until otherwise provided by law, and thereafter not to exceed three fourths ($\frac{3}{4}$) of the rates levied therein, provided that, beginning July 1, 1983, the tax levied shall apply only to the first six hundred sixty-seven dollars (\$667) on the sale or use of any single article of personal property; beginning on July 1, 1984, to the first eight hundred eighty-nine dollars (\$889) on the sale or use of any single article of personal property; and beginning on July 1, 1985, to the first one thousand one hundred dollars (\$1,100) on the sale or use of any single article of personal property.

(2) Any five dollar (\$5.00) or seven and one half dollar (\$7.50) tax limit on the sale or use of any single article of personal property in effect at present may be removed, and, by resolution in the case of counties and ordinance in the case of municipalities, the tax at the existing rate may, instead, be made to apply to the bases provided in subdivision (a)(1) of this section. The resolution or ordinance shall be passed at least twice at two or more consecutive public meetings, not more than one of which may be held on any single day. Notice of the meetings and of the fact that this matter is on the agenda of the meetings shall be published at least once in a newspaper of general circulation throughout the jurisdiction involved not less than seven (7) days before the first of the meetings.

(3) Once any local sales tax limit has been removed and the tax rate applied to the base provided in subdivision

(a)(1) of this section, future increases in the base beginning on the dates specified in subdivision (a)(1) shall be automatic and shall not require further action of the local governing body. For any municipality or county which implements a local sales tax for the first time after May 17, 1983, or during the phase-in period provided in subdivision (a)(1), future increases in the base beginning on the dates specified in subdivision (a)(1) shall be automatic and shall not require further action of the local governing body.

(b) Notwithstanding other provisions of this chapter, with respect to industrial and farm machinery as defined in § 67-6-102, and with respect to water sold to or used by manufacturers at the state tax rate of one percent (1%) as authorized in § 67-6-206, the local tax thereon shall be imposed at the rate of one third of one percent ($.33\frac{1}{3}\%$) whenever the rate of the local tax does not exceed one percent (1%) and at the rate of one half of one percent ($.5\%$) whenever the rate of the local tax exceeds one percent (1%). The maximum local tax on the sale or use of any single article of industrial or farm machinery shall be as provided hereinabove. [Acts 1963, ch. 329, § 2; 1968 (Adj. S.), ch. 488, §§ 1, 4; 1971, ch. 117, § 7; 1971, ch. 148, § 1; 1972 (Adj. S.), ch. 653, § 2; 1973, ch. 239, § 2; 1973, ch. 340, § 1; 1974 (Adj. S.), ch. 675, § 2; 1975, ch. 316, § 2; 1976 (Adj. S.), ch. 466, § 5; 1977, ch. 43, § 1; 1977, ch. 178, § 2; 1978 (Adj. S.), ch. 592, § 2; impl. am. Acts 1978 (Adj. S.), ch. 934, §§ 7, 36; 1979, ch. 308, § 3; 1980, (Adj. S.), ch. 886, § 2; 1981, ch. 182, § 2; 1982 (Adj. S.), ch. 585, § 1; 1983, ch. 278, § 1; T.C.A., § 67-3050.]

67-6-703. *Priority of county levy.*—(a) The levy of the tax by a county shall preclude, to the extent of the coun-

ty tax, any city or town within such county from levying the tax, but a city or town shall at any time have the right to levy the tax at a rate equal to the difference between the county tax and the maximum rate authorized herein. For cities and towns having territory in more than one county, the term "cities and towns" is defined as that part of their territory in which they are not precluded by a county tax.

(b) If an ordinance levying the tax herein authorized is adopted by a city or town prior to adoption of the tax by the county in which the city or town is located, the effectiveness of the ordinance shall be suspended for a period of forty (40) days beyond the date on which it would otherwise be effective under the charter of the city or town. If during this forty-day period, the county legislative body adopts a resolution to levy the tax at least equal to the rate provided in such ordinance, the effectiveness of the ordinance shall be further suspended until it is determined whether the county tax is to be operative, as provided in § 67-6-706. If the county tax becomes operative by approval of the voters as provided in § 67-6-706, the ordinance shall be null and void, but if the county tax does not become operative the ordinance shall become effective on the same date that the county tax is determined to be non-operative, and the election required by § 67-6-706 shall be held. After initial adoption of the tax by a county or a city or town therein, the tax rate may be increased by a city, town or county under the same procedure. If the tax levied by a county legislative body is finally determined to be non-operative, such action shall not preclude subsequent action by the county to adopt the tax at a rate at least equal to the city or town tax rate, in which

event the city or town tax shall cease to be effective; provided, however, that the city or town shall receive from the county tax the same amounts as would have been received from the city or town tax until the end of the current fiscal year of the city or town. [Acts 1963, ch. 329, § 3; 1968 (Adj. S.), ch. 488, § 2; T.C.A., § 67-3051.]

67-6-704. *Exemptions.*—No county or incorporated city or town is authorized to levy any tax on the sale, purchase, use, consumption or distribution of electric power or energy, or of natural or artificial gas, or coal and fuel oil. [Acts 1963, ch. 329, § 2; 1968 (Adj. S.), ch. 488, §§ 1, 4; 1971, ch. 117, § 7; 1971, ch. 148, § 1; 1972 (Adj. S.), ch. 653, § 2; 1973, ch. 239, § 2; 1973, ch. 340, § 1; 1974 (Adj. S.), ch. 675, § 2; 1975, ch. 316, § 2; 1976 (Adj. S.), ch. 466, § 5; 1977, ch. 43, § 1; 1977, ch. 178, § 2; 1978 (Adj. S.), ch. 592, § 2; impl. am. Acts 1978 (Adj. S.), ch. 934, §§ 7, 36; 1979, ch. 308, § 3; 1980 (Adj. S.), ch. 886, § 2; 1981, ch. 182, § 2; 1982 (Adj. S.), ch. 585, § 1; 1983, ch. 278, § 1; T.C.A., § 67-3050.]

67-6-705. *Tax subject to referendum.*—(a) The operation of the resolution or ordinance authorized in § 67-6-702 shall be subject to approval of the voters as required in § 67-6-706 and to the other provisions of this part.

(b) Nothing herein contained shall be deemed to permit an increase in the privilege tax rates hereby authorized, without the ratification thereof in the manner provided in § 67-6-706, regardless of the nature of any previous call and regardless of future action of the general assembly regarding the levy of the tax authorized by this chapter.

(c) Any amendment to any existing tax rate shall be subject to approval of the voters of the city or county

in the same manner as is required for the initial adoption of the tax; provided, however, that a change in the limitation on the amount of the tax made in accordance with § 67-6-702(a)(2) shall not be subject to approval of the voters of the city or county. [Acts 1963, ch. 329, § 2; 1968 (Adj. S.), ch. 488, §§ 1, 4; 1971, ch. 117, § 7; 1971, ch. 148, § 1; 1972 (Adj. S.), ch. 653, § 2; 1973, ch. 239, § 2; 1973, ch. 340, § 1; 1974 (Adj. S.), ch. 675, § 2; 1975, ch. 316, § 2; 1976 (Adj. S.), ch. 466, § 5; 1977, ch. 43, § 1; 1977, ch. 178, § 2; 1978 (Adj. S.), ch. 592, § 2; impl. am. Acts 1978 (Adj. S.), ch. 934, §§ 7, 36; 1979, ch. 308, § 3; 1980 (Adj. S.), ch. 886, § 2; 1981, ch. 182, § 2; 1982 (Adj. S.), ch. 585, § 1; 1983, ch. 278, § 1; T.C.A., § 67-3050.]

67-6-706. *Referendum*.—(a)(1) Any ordinance or resolution of a county or of a city or town levying the tax under authority of this part shall not become operative until approved in an election herein provided in the county, or the city or town, as the case may be.

(2) The county election commission shall hold an election thereon, providing options to vote “FOR” or “AGAINST” the ordinance or resolution, not less than forty-five (45) days nor more than sixty (60) days after the receipt of a certified copy of such ordinance or resolution, and a majority vote of those voting in the election shall determine whether the ordinance or resolution is to be operative.

(3) If the majority vote is for the ordinance or resolution, it shall be deemed to be operative on the date that the county election commission makes its official canvass of the election returns. Provided, however, that no tax shall be collected under any such ordinance or

resolution until the first day of a month occurring at least thirty (30) days after the operative date.

(b)(1) If a county legislative body adopts a resolution to levy the tax at the same rate that is operative in a city or town in the county, the election under this section to determine whether the county tax is to be operative shall be open only to the voters residing outside of such city or town. If the county tax is at a higher rate than the rate of the city or town tax, the election shall be also open to the voters of the city or town.

(2) Should any county or city or town hold an election hereunder, and the ordinance or resolution is rejected, no other election thereon shall be held by such county, city or town for a period of six (6) months from the date of the holding of such prior election, except that in those counties of the state having a population of not more than seven hundred fifty thousand (750,000) nor less than seven hundred thousand (700,000) and not more than two hundred seventy-eight thousand (278,000) and not less than two hundred fifty thousand (250,000) according to the federal census of 1970 or any subsequent federal census, in case of rejection, the limitation period on subsequent elections shall be one (1) year from the date of the holding of such prior election. [Acts 1963, ch. 329, § 5; 1967, ch. 113, § 1; 1968 (Adj. S.), ch. 488, § 3; 1971, ch. 83, § 1; 1972 (Adj. S.), ch. 455, § 1; 1982 (Adj. S.), ch. 591, § 1; T.C.A., § 67-3053.]

67-6-707. *Petition for tax.*—A resolution or ordinance levying the tax authorized may be initiated by petition of the voters in the following manner:

(1) The petition shall be addressed to the county legislative body or the governing body of the city or town requesting that a resolution or ordinance be adopted levying the tax and shall state the rate of the tax, whether the tax is to be collected by the county, city or town, or by the department of revenue of the state, and shall specify the officer against whom suit for the recovery of any tax illegally assessed or collected shall be brought.

(2) The petition shall be signed by at least a number of registered voters in the taxing jurisdiction equal to ten percent (10%) of the total number of registered voters in the taxing jurisdiction on the date the petition is filed. Provided, a petition requesting a resolution of the county legislative body may not be signed by a registered voter in a city or town where a tax herein authorized is operative equal to that levied by the resolution, and the registered voters therein shall not be considered in arriving at the required percentage.

(3) A petition requesting a resolution shall be filed with the county clerk, a petition requesting an ordinance with the chief clerical officer of the city or town, and a photographic copy of the petition shall be filed at the same time with the county commissioners of elections who shall be the judges of the sufficiency of the petition.

(4) If within thirty (30) days from the filing of a petition a resolution or ordinance is not adopted as requested and a certified copy filed with the commissioners of elections, the petition shall constitute a resolution or ordinance, and the commissioners of elections shall hold an election thereon as in § 67-6-706(a). [Acts 1963, ch. 329, § 5; 1967, ch. 113, § 1; 1968 (Adj. S.), ch. 488, § 3; 1971, ch. 83, § 1; 1972 (Adj. S.), ch. 455, § 1; T.C.A., § 67-3053.]

67-6-708. *Termination of tax.*—The tax imposed in this part shall remain in effect in the county or city on a perpetual basis as permitted by law, unless the city or county by ordinance or resolution respectively shall provide for a specific termination date. The city or county by ordinance or resolution respectively may provide for a specific period of time during which the tax shall be in effect. [Acts 1963, ch. 329, § 2; 1968 (Adj. S.), ch. 488, §§ 1, 4; 1971, ch. 117, § 7; 1971, ch. 148, § 1; 1972 (Adj. S.), ch. 653, § 2; 1973, ch. 239, § 2; 1973, ch. 340, § 1; 1974 (Adj. S.), ch. 675, § 2; 1975, ch. 316, § 2; 1976 (Adj. S.), ch. 466, § 5; 1977, ch. 43, § 1; 1977, ch. 178, § 2; 1978 (Adj. S.), ch. 592, § 2; impl. am. Acts 1978 (Adj. S.), ch. 934, §§ 7, 36; 1979, ch. 308, § 3; 1980 (Adj. S.), ch. 886, § 2; 1981, ch. 182, § 2; 1982 (Adj. S.), ch. 585, § 1; 1983, ch. 278, § 1; T.C.A., § 67-3050.]

67-6-709. *Repeal of tax.*—Any ordinance or resolution of a county, city or town adopted in accordance with this part may be repealed in the same manner as provided herein for its adoption; provided, that any election for the repeal of a county tax shall be open to the voters of the entire county. [Acts 1963, ch. 329, § 7; T.C.A., § 67-3055.]

67-6-710. *Collection and administration.*—(a)(1) In collecting and administering the tax levied under the authority of this part, counties, cities and towns shall have all the powers which the commissioner of revenue has in collecting and administering the state sales tax.

(2) Rules and regulations promulgated by the commissioner of revenue may be adopted by reference, and penalties and interest for delinquencies imposed equal to the rates provided in § 67-6-516.

(b)(1) When so provided in the resolution or ordinance of adoption, the department of revenue of the state of Tennessee shall collect such tax concurrently with the collection of the state tax in the same manner as the state tax is collected, provided that the department has determined that such collection of the tax is feasible, and has promulgated rules and regulations governing such collection.

(2) The department shall remit the proceeds of the tax to the county, city or town levying the tax, less a reasonable amount of percentage as determined by the department to cover the expenses of administration and collection.

(c) The county, city or town shall furnish a certified copy of the adopting resolution or ordinance to the department of revenue in accordance with regulations prescribed by the department.

(d)(1) Upon any claim of illegal assessment and collection, the taxpayer shall have the remedy provided in § 67-6-527, it being the intention of the legislature that the provisions of law which apply to the recovery of state taxes illegally assessed and collected be conformed to apply to the recovery of taxes illegally assessed and collected under the authority of this part.

(2) Notice of any tax paid under protest shall be given to the county legislative body or the governing body of the city or town.

(3) The resolution or ordinance levying the tax shall designate the county or municipal officer against whom suit may be brought for recovery in the event the tax is

collected by the department of revenue. [Acts 1963, ch. 329, § 6; T.C.A., § 67-3054.]

67-6-711. *Collection of local sales tax by state.*—Notwithstanding any provisions of this chapter to the contrary, a county legislative body or the governing body of any incorporated city or town may authorize, by resolution or ordinance, the state to collect a local sales tax previously authorized and approved pursuant to the provisions of this part. Such authorization by any county legislative body or by the governing body of any incorporated city or town shall be fully effective without necessity of a referendum on such resolution; provided, however that no tax shall be collected under any such authorization until the first day of a month occurring at least thirty (30) days after receipt of a certified copy of such resolution or ordinance by the commissioner of revenue. [Acts 1963, ch. 329, § 5; 1967, ch. 113, § 1; 1968 (Adj. S.), ch. 488, § 3; 1971, ch. 83, § 1; 1972 (Adj. S.), ch. 455, § 1; 1982 (Adj. S.), ch. 591, § 1; T.C.A., § 67-3053.]

67-6-712. *Distribution of revenue.*—The tax levied by a county under this part shall be distributed as follows:

(1) One-half ($\frac{1}{2}$) of the proceeds shall be expended and distributed in the same manner as the county property tax for school purposes is expended and distributed; and

(2) The other half ($\frac{1}{2}$) shall be distributed as follows:

(A) Collections for privileges exercised in unincorporated areas, to such fund or funds of the county as the governing body of the county shall direct;

(B) Collections for privileges exercised in incorporated cities and towns, to the city or town in which the privilege is exercised;

(C) Provided, however, that a county and city or town may by contract provide for other distribution of the half ($\frac{1}{2}$) not allocated to school purposes. [Acts 1963, ch. 329, § 4; 1967, ch. 90, § 1; T.C.A., § 67-3052.]

UNITED STATES
CODE

Title 33, U.S.C.:

§ 1. Regulations by Secretary of Army for navigation of
waters generally

It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department. Such regulations shall be posted, in conspicuous and appropriate places, for the information of the public; and every person and every corporation which shall violate such regulations shall be deemed guilty of a misdemeanor and, on conviction thereof in any district court of the United States within whose territorial jurisdiction such offense may have been committed, shall be punished by a fine not exceeding \$500, or by imprisonment (in the case of a natural person) not exceeding six months, in the discretion of the court.

Any regulations prescribed by the Secretary of the Army in pursuance of this section may be enforced as provided in section 413 of this title, the provisions whereof are made applicable to the said regulations.

§ 4. Water gauges on Mississippi River and tributaries

The Secretary of the Army is authorized and directed to have water gauges established, and daily observations made of the rise and fall of the Mississippi River and its tributaries.

For the purpose of securing the uninterrupted gauging of the waters of the Mississippi River and its tributaries, as provided for in this section, upon the application of the Chief of Engineers, the Secretary of the Army is authorized to draw his warrant or requisition, from time

to time, upon the Secretary of the Treasury for such sums as may be necessary to do such work, not to exceed in the aggregate for each year the sum of \$9,600.

§ 419. Regulation by Secretary governing transportation and dumping of dredgings, refuse, etc., into navigable waters; oyster lands; appropriations

The Secretary of the Army is authorized and empowered to prescribe regulations to govern the transportation and dumping into any navigable water, or waters adjacent thereto, of dredging, earth, garbage, and other refuse materials of every kind or description, whenever in his judgment such regulations are required in the interest of navigation. Such regulations shall be posted on conspicuous and appropriate places for the information of the public; and every person or corporation which shall violate the said regulations, or any of them, shall be deemed guilty of a misdemeanor and shall be subject to the penalties prescribed in sections 411 and 412 of this title, for violation of the provisions of section 407 of this title: *Provided*, That any regulations made in pursuance hereof may be enforced as provided in section 413 of this title, the provisions whereof are made applicable to the said regulations: *Provided further*, That this section shall not apply to any waters within the jurisdictional boundaries of any State which are now or may hereafter be used for the cultivation of oysters under the laws of such State, except navigable channels which have been or may hereafter be improved by the United States, or to be designated as navigable channels by competent authority, and in making such improvements of channels, the material dredged shall not be deposited upon any ground in use in accordance with the laws of such State for the cultivation of oysters, except in compliance with said laws: *And provided further*, That any expense necessary in executing this Section may be paid from funds available for the improvement of the harbor or waterway, for which regulations may be prescribed, and in case no such funds are available the said expense may be paid from appropria-

tions made by Congress for examinations, surveys, and contingencies of rivers and harbors.

§ 622. Contracts, etc., for implementation of projects for improvements and for dredging and related work by private industry; performance of work by federally owned fleet and transition to use of private industry; requirements, standards, and study relating to transition and accompanying reduction of federally owned fleet.

(a) The Secretary of the Army, acting through the Chief of Engineers (hereinafter referred to as the "Secretary"), in carrying out projects for improvement of rivers and harbors (other than surveys, estimates, and gagings) shall, by contract or otherwise, carry out such work in the manner most economical and advantageous to the United States. The Secretary shall have dredging and related work done by contract if he determines private industry has the capability to do such work and it can be done at reasonable prices and in a timely manner. During the four-year period which begins on April 26, 1978, the Secretary may limit the application of the second sentence of his subsection for work for which the federally owned fleet is available to achieve an orderly transition to full implementation of this subsection.

(b) As private industry reasonably demonstrates its capability under subsection (a) of this section to perform the work done by the federally owned fleet, at reasonable prices and in a timely manner, the federally owned fleet shall be reduced in an orderly manner, as determined by the Secretary, by retirement of plant. To carry out emergency and national defense work the Secretary shall retain only the minimum federally owned fleet capable of performing such work and he may exempt from the provisions of this section such amount of work as he determines to be reasonably necessary to keep such fleet fully operational, as determined by the Secretary, after the minimum fleet requirements have been determined. Notwithstanding the preceding sentence, in carrying out the

reduction of the federally owned fleet, the Secretary may retain so much of the federally owned fleet as he determines necessary, for so long as he determines necessary, to insure the capability of the Federal Government and private industry together to carry out projects for improvements of rivers and harbors. For the purpose of making the determination required by the preceding sentence the Secretary shall not exempt any work from the requirements of this section. The minimum federally owned fleet shall be maintained to technologically modern and efficient standards, including replacement as necessary. The Secretary is authorized and directed to undertake a study to determine the minimum federally owned fleet required to perform emergency and national defense work. The study, which shall be submitted to Congress within two years after April 26, 1978, shall also include preservation of employee rights of persons presently employed on the existing federally owned fleet.

3

Supreme Court, U.S.

FILED

APR 6 1988

JOSEPH F. SPANIOLO, JR.
CLERK

No. 87-1508

In The
Supreme Court of the United States

October Term, 1987

BEAN DREDGING CORPORATION,

Petitioner,

vs.

MARTHA B. OLSEN, COMMISSIONER OF
REVENUE OF THE STATE OF TENNESSEE,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Tennessee

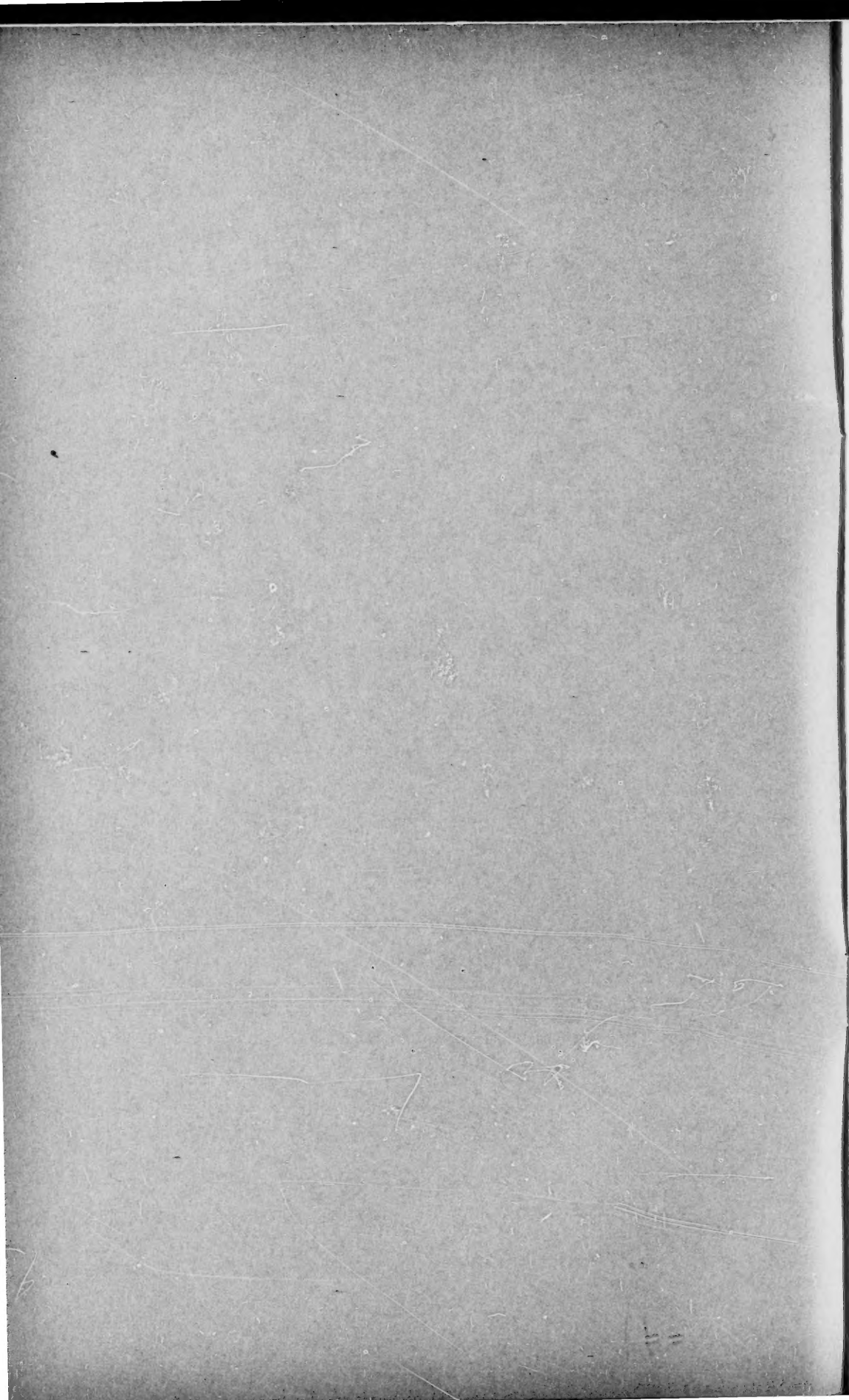
**BRIEF IN OPPOSITION TO
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40 pp



QUESTIONS PRESENTED FOR REVIEW

Respondent is dissatisfied with the petitioner's statement of the questions presented, and submits that this petition requires the Court's consideration of the following questions:

1. Whether a petitioner may raise before this Court an issue which it expressly conceded in the courts below and which, though included in the petitioner's original complaint, was not addressed in the lower courts because of petitioner's concession?

2. Whether a state, consistent with the Commerce Clause, may impose its general sales and use tax upon the use of a dredge operating and anchoring within the territory of that state and engaged in the maintenance of an interstate waterway?

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No. 87-1508

In The
Supreme Court of the United States
October Term, 1987

BEAN DREDGING CORPORATION,
Petitioner,
vs.

MARTHA B. OLSEN, COMMISSIONER OF
REVENUE OF THE STATE OF TENNESSEE,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Tennessee

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

Respondent Martha B. Olsen, Commissioner of Revenue of the State of Tennessee, hereby responds to and opposes the issuance of a writ of certiorari to review the judgment of the Supreme Court of Tennessee.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee, of which review is sought, is reported at 742 S.W.2d 259 (Tenn. 1987). It is also reproduced in Petitioner's Appendix at 2. The Final Decree and oral ruling of the

trial court, the Chancery Court of Shelby County, Tennessee, are unpublished and are reproduced in Petitioner's Appendix at 36 and 38, respectively. [Petitioner's Appendix is hereinafter abbreviated as "Pet. App." References to the record are denoted herein by the abbreviation "R." The transcript of the trial is indicated by the abbreviation "Tr."]

CONSTITUTIONAL PROVISIONS AND STATUTES

The Commerce Clause of the United States Constitution:

The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes

U.S. CONST., Art. I, § 8, cl. 3.

United States Code:

28 U.S.C. § 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or

claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Tennessee Code Annotated:

TENN. CODE ANN. § 67-6-102(16) [formerly § 67-3002(g)]

“Storage” means and includes any keeping or retention in this state of tangible personal property for use or consumption in this state, or for any purpose other than sale at retail in the regular course of business

TENN. CODE ANN. § 67-6-201 [formerly § 67-3003]

It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who uses or consumes in this state any item or article of tangible personal property as defined in this chapter, irrespective of the ownership thereof or any tax immunity which may be enjoyed by the owner thereof, or who is the recipient of any of the things or services taxable under this chapter, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined in this chapter, or who leases or rents such property, either as lessor or lessee, within the state of Tennessee, or who charges admission, dues or fees taxable under this chapter, or who sells space under this chapter.

TENN. CODE ANN. § 67-6-210 [formerly § 67-3005]

(a) On all tangible personal property imported or caused to be imported from other states or foreign countries, and used by him, the “dealer” as defined in § 67-6-102(4), shall pay the tax imposed by this

chapter on all articles of tangible personal property so imported and used, the same as if the articles had been sold at retail for use or consumption in this state. For the purposes of this chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

(b) It is not the intention of this section to levy the use tax with respect to the personal automobile, the personal manufactured home as defined in § 68-36-202(6), the personal effects, or the household furniture to be used in the residence of a person who, having been a bona fide resident of another state, has moved to and become a resident of Tennessee, and has caused to be imported into Tennessee such personal automobile, personal manufactured home as defined in § 68-36-202(6), personal effects, or household furnishing.

TENN. CODE ANN. § 67-6-321 [formerly
§ 67-3012(8)]

There shall be exempt from sales tax the transfer, by any dealer in personal property, of railroad rolling stock or of vessels or barges of fifty (50) tons or over of displacement where the purchaser gives the seller an affidavit that such vessels or rolling stock are being purchased for use in interstate commerce or outside the state of Tennessee; and any such vessel or rolling stock shall also be exempt from use tax so long as it is being used in interstate commerce.

STATEMENT OF THE CASE

Background

This case concerns the application of Tennessee's use tax to vessels of a dredging company engaged in dredging the Mississippi River within the boundaries of Tennessee. The Commissioner of Revenue of Tennessee determined that the use of the dredge and its attendant plant at dredging sites in Tennessee and the storage of the dredge in Tennessee for extended periods of time made the dredge subject to Tennessee's general sales and use tax, since no sales or use tax had been paid with respect to these vessels in any other state.

Agents of the Commissioner audited the petitioner for the period from January 1, 1980 through December 31, 1982 and determined a use tax liability of \$571,552.43, including penalty and interest, based on the undisputed depreciated value of the vessels. Petitioner paid this amount under protest on August 18, 1983 and filed suit on December 14, 1983 in the Chancery Court of Shelby County, Tennessee, in accordance with Tennessee tax procedures. (Pet. App. 76). Petitioner's complaint was based on the assertion that it was exempt from the Tennessee use tax pursuant to TENN. CODE ANN. § 67-6-321, which provides an exemption for vessels used in interstate commerce from the tax otherwise applicable. Although petitioner alleged in its complaint that the tax violated the Commerce Clause of the United States Constitution, Article I, section 8, clause 3, (Pet. App. 80, ¶ 13), it conceded that issue at trial and did not raise it throughout the State court proceedings.

Trial was held in the Chancery Court of Shelby County, Tennessee, on May 6, 1986, before the Honorable D. J.

Alissandratos, Chancellor, who ruled from the bench in favor of the plaintiff. (Pet. App. 36, 40). Upon direct appeal to the Supreme Court of Tennessee, the trial court decision was reversed and the tax liability was upheld. 742 S.W.2d 259. (Pet. App. 1, 2). Petitioner now seeks review by this Honorable Court.

Basis of the Assessment

Petitioner, Bean Dredging Corporation, contracted with the United States Corps of Engineers to do dredging work on the Mississippi River between River Miles 599 and 800, pursuant to separate contracts for the years 1980, 1981, and 1982. R. 26, Stipulation, ¶ 6. In performance of this contract petitioner was to remove silt and impediments from the river as directed by the Corps of Engineers from time to time. The main vessel used in dredging was the *Lenel Bean*, a self-propelled, dustpan suction dredge. A number of associated vessels accompanied the dredge, including the *Richelle* (a derrick barge), the *Tender Robyn* (a crew boat), the *Recon IV* (a survey boat), and several barges constituting a pipeline used in depositing dredged material at designated areas. R. 27, Stipulation, ¶ 8.

The dredge first entered Tennessee waters on May 27, 1980. R. 27, Exhibit H to Stipulation — Document entitled “Summary of Locations.” It proceeded to work at various sites in the Mississippi River, be they in Tennessee, Arkansas, or Mississippi. Between particular assignments, the dredge would dock at McKellar Lake, south of downtown Memphis in Shelby County, Tennessee. The dredge would remain there during high water periods or otherwise until the Corps of Engineers requested petitioner to perform an assignment. R. 26, Stipulation, ¶ 6.

During its docking in McKellar Lake, routine maintenance and repairs would be done, and some of the crew might be laid off, depending on the length of docking.

When dredging at a site, the *Lenel Bean* would be held in place by wires anchored at several places in the river. These wires are 5500 feet long, thus limiting movement of the dredge within that range. Tr. 33. Upon completing its assignment at a site, the process of preparing to move the dredge would require 1-1/2 to 2 hours. (Tr. 24). During operation the dredge would suck silt, rock, etc. from the bottom of the river; the pipeline would then carry it to a deposit site. The site of dredging and the place of deposit could be no more than 1000 feet apart, that being the length of the pipeline. (Tr. 51, 53). At some locations, both sides of the river are in Tennessee (Tr. at 34); at other locations, the west bank is in Arkansas. While the entire dredging process at a site might be in Tennessee, it would not be unusual for the dredging area to be in one state and the discharge area in another. (Tr. 39).

McKellar Lake is the base of operations of the dredge in the Tennessee area. When the dredge is "idle", it is contractually obligated to be in service within five days after notification of a job site by the Corps of Engineers. (Tr. 43-44, 59). The operators of the dredge do not know when or where it will be called into service, and they may choose to demobilize the plant while awaiting an assignment. R. 26, Exhibits E, F, & G to Stipulation, at page 2A-2. During idle periods, repairs are made, but no compensation is earned under the contract unless the *Lenel Bean* is actually dredging, or engaged in mobilization. (Tr. 61, 64-65).

During the 1980-1982 period at issue, the *Lenel Bean* anchored in McKellar Lake, Tennessee, on a number of occasions, sometimes for a few days, sometimes for many months. R. 27, Exhibit H to Stipulation. These periods when the dredge was idle at McKellar Lake are as follows:

May 27, 1980 through June 30, 1980

Aug. 22, 1980 through Aug. 31, 1980

Nov. 7, 1980 through Nov. 17, 1980

June 2, 1981 through July 19, 1981

Nov. 1, 1981 through Aug. 6, 1982

Sept. 23, 1982 through Dec. 31, 1982

(Tr. 59; R. 27, Exhibit H — Document entitled “Summary of Locations”)

These periods vary in length from nine days to more than nine months. During these periods no material was dredged and no compensation earned therefrom. Captain Davis of the *Lenel Bean* regards the dredge as having been “shut down” during these times. (Tr. 46). Most of the crew is laid off, and only a skeleton crew is maintained during such idle periods. (Tr. 49, 60). Between assignments by the Corps, the dredge is free to do as it pleases. Between the 1980 and 1981 summer dredging periods, the *Lenel Bean* left the Memphis area altogether and worked in Mobile Bay, Alabama. R. 27, Exhibit H, Document entitled “Summary of Locations.”

Pursuant to audit, the Commissioner of Revenue determined that the petitioner became liable for the Tennessee use tax when the dredge entered the State of Tennessee and did work within the State, since petitioner exer-

cised the privilege of using the vessels in Tennessee and had paid no sales or use tax in any state.¹ The Commissioner further determined that plaintiff incurred tax, alternatively, upon the storage of the vessels at McKellar Lake during periods of docking there, which also constitutes a taxable incident. The plaintiff resisted this assessment, contending that the dredge was at all times engaged in interstate commerce and was thus exempt from Tennessee use taxes under State law, TENN. CODE ANN. § 67-6-321. It asserted that the periods of docking were a part of its operations and that the vessels were still in interstate commerce during those periods. The instant litigation resulted.

Proceedings in State Court

Petitioner now asserts that the imposition of Tennessee's use tax upon it is in violation of the Commerce Clause of the United States Constitution. Although this contention was made in the original complaint (Pet. App. 80, ¶ 13), it was expressly and repeatedly conceded by petitioner in both the trial and appellate courts. Instead, petitioner contended only that the *Lenel Bean* was exempt from sales or use tax pursuant to TENN. CODE ANN. § 67-6-321, which exempts vessels used in interstate commerce. The decision in the State courts turned upon whether the dredge's activities in Tennessee were in inter-

¹ Petitioner subsequently showed that sales tax of approximately \$1,333.75 was paid to the State of Louisiana on one of the smaller ancillary vessels. R. 27, Stipulation, ¶ 9, Exhibit I. The Commissioner thus agreed that the tax liability should be reduced by this sum, plus attributable interest and penalty. This was recognized by the Supreme Court in its decision. 742 S.W.2d at 262. (Pet. App. 9-10).

state commerce within the meaning of the Tennessee statute. Petitioner conceded that Tennessee had the constitutional power to tax the dredge even if it were deemed to be in interstate commerce, and alleged merely that Tennessee had not extended its taxing statutes to their federal constitutional limits.

Petitioner's failure to raise any federal constitutional issue is apparent in its trial briefs. (Pet. App. 43, 44, 53). It was also expressly stated at trial in the opening statement of petitioner's counsel, as follows:

I would also state, your Honor, that *we're not dealing here with United States constitutional limitations on taxation*. We recognize that there are aspects of interstate commerce that states can tax. However, *it's clear that the State of Tennessee has elected to exempt numerous activities from Tennessee taxation that could be taxed without violating the U.S. Constitution, and that's precisely what we have here*. This exemption statute itself is an exemption from areas that could well be taxed without violating the U.S. Constitution. So we're not dealing with the constitutional limitations. And there are a number of cases that say you don't violate the U.S. Constitution by certain activities, but they are not in the face of an exemption statute such as Tennessee's. (emphasis added)

Tr. 9-10 (Respondent's Appendix at 5).

The same approach was taken in petitioner's brief before the Tennessee Supreme Court. (Pet. App. 15, 16). The issues raised in that brief turn exclusively on Tennessee statutes, and the Commerce Clause is not invoked. That brief, as well as petitioner's oral argument before the Tennessee Supreme Court, led that Court to observe in its reported opinion:

Appellee [Bean Dredging Corporation] concedes that the operation of its property within Tennessee territory during the tax years involved was clearly sufficient to subject it to the taxing power of the state. There is no claim of exemption under the Commerce Clause of the United States Constitution. Appellee relies solely upon the exemption contained in T.C.A. § 67-6-321 as follows

742 S.W.2d at 261 (Pet. App. 5-6).

Thus petitioner did not merely fail to raise the federal constitutional issue before the State courts; instead it expressly conceded and waived that issue. Petitioner now seeks to raise the federal constitutional issue under the Commerce Clause before this High Court.

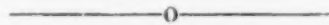
SUMMARY OF ARGUMENT

On review by writ of certiorari, this Court will review only federal questions which were appropriately raised and decided by the courts below. The Commissioner of Revenue submits that a granting of the writ would thus be improper in this case, since the Commerce Clause issue raised by petitioner in this Court was not raised below, but instead was expressly conceded and waived.

Concerning the merits of the Commerce Clause claim, it is well settled that a state may levy a tax on aspects of interstate commerce, so long as the criteria set forth in this Court's *Complete Auto Transit* decision are satisfied. The Commissioner submits that the Tennessee Supreme Court has correctly decided that petitioner's activities in

Tennessee were not in interstate commerce, since dredging is a localized activity by nature, and since the dredge was stored in Tennessee for lengthy periods. The Commissioner asserts, however, that even if the dredge's activities were regarded as interstate commerce, Tennessee may constitutionally impose its use tax on them. The instant tax clearly meets all the factors of the *Complete Auto Transit* test and fully comports with the Commerce Clause, even if the dredge were to be regarded as being in interstate commerce.

The decision of the Tennessee Supreme Court is manifestly correct and does not violate the Commerce Clause. This case presents no novel or unsettled questions of law that would justify the granting of the writ.



ARGUMENT

I.

PETITIONER FAILED TO RAISE ANY COMMERCE CLAUSE ISSUE BEFORE THE STATE COURTS AND IS PRECLUDED FROM DOING SO NOW.

In order for this Court to have jurisdiction under 28 U.S.C. § 1257 by writ of certiorari, it is essential that a substantial federal question have been properly raised in the state court proceedings. *R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE* § 3.25 (5th ed. 1978). This is a cardinal rule of appellate practice. Unless the federal question has been raised below, the validity of a statute has not been "drawn in question," or a federal

title, right, privilege, or immunity has not been “specially set up or claimed,” as required by the language of 28 U.S.C. § 1257(3), the statute authorizing review by writ of certiorari. This Court, both by reason of law and common sense, “cannot decide issues raised for the first time here,” *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 999, 35 L. Ed. 2d 346, 348 (1973); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312, 91 S. Ct. 658, 665, 28 L. Ed. 2d 64, 72 (1971); *Cardinale v. Louisiana*, 349 U.S. 437, 438-39, 89 S. Ct. 1161, 1162-63, 22 L. Ed. 2d 398, 400-01 (1969). It is well established that the Supreme Court is vested with no jurisdiction unless a federal question was raised and decided in the state court below. *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334, 88 S. Ct. 1601, 1616-18, 20 L. Ed. 2d 603, 621-22 (1968) (Harlan, J., dissenting); *Crowell v. Randell*, 10 Pet. (35 U.S.) 368, 391, 9 L. Ed. 458, 467 (1836).

In the instant case, the Commerce Clause issue that the taxpayer now advances was not raised in the state courts, but was expressly conceded. As previously noted, the taxpayer’s counsel at trial told the judge, “[W]e’re not dealing here with United States constitutional limitations on taxation.” Tr. 9 (Respondent’s Appendix at 5). He went on to say that the case concerned activities that Tennessee could tax under the Federal Constitution, but which were allegedly exempted by state law. *Id.* Thus despite the mentioning of the Commerce Clause issue in the original complaint, that contention was not addressed by the trial court.

Regardless of whether a federal issue was raised in the trial court, it must also be pursued on appeal. *See Beck v. Washington*, 369 U.S. 451, 549-54, 82 S. Ct. 955,

960-62, 8 L. Ed. 2d 98, 107-09 (1962); *Wolfe v. North Carolina*, 364 U.S. 177, 195, 80 S. Ct. 1482, 1492, 4 L. Ed. 2d 1650, 1662 (1960). Here the taxpayer did not mention the federal issue in its briefs, but instead expressly conceded the state's constitutional taxing power. As the Tennessee Supreme Court stated, the taxpayer

concede[d] that the operation of its property within Tennessee territory during the tax years involved was clearly sufficient to subject it to the taxing power of the state.

742 S.W.2d at 261 (Pet. App. 5). There was no claim of exemption under the Commerce Clause, but rather under TENN. CODE ANN. § 67-6-321 above. *Id.* (Pet. App. 5-6).

Thus the Tennessee Supreme Court had no reason to address the Commerce Clause issue, and did not do so. Because the federal question was not addressed below, this Court may not entertain it on writ of certiorari. See *Adler v. Board of Education*, 342 U.S. 485, 496, 72 S. Ct. 380, 386-87, 96 L. Ed. 517, 526 (1952); *State Farm Mutual Insurance Co. v. Duel*, 324 U.S. 154, 160-61, 65 S. Ct. 573, 576-77, 89 L. Ed. 812, 818 (1945).

The taxpayer is simply attempting to obtain review by this Court of a question which was not addressed by the state courts. The issue was not addressed in the state forums because the taxpayer failed to brief or argue it and instead expressly conceded the issue. It clearly is improper to present an issue to this High Court on such a state court record.

Therefore, the Commissioner submits that these procedural defects justify denial of the petition for writ of certiorari.

II.

IMPOSITION OF TENNESSEE'S USE TAX ON PETITIONER'S DREDGE DOES NOT VIO- LATE THE COMMERCE CLAUSE.

A. Background under the Tennessee Use Tax.

On the merits of the taxpayer's constitutional claim, the Commissioner submits that under well-established precedents the instant tax does not violate the Commerce Clause. The taxpayer's counsel did not err in conceding the federal issue in State court, as noted *supra*; instead he was aware that the taxpayer's only plausible argument was under Tennessee law. There simply is no doubt about the power of a state to impose sales and use tax on property sold and used within the state, even on property involved in interstate commerce.

Tennessee's use tax is part of the sales tax scheme. TENN. CODE ANN. § 67-6-201 levies a tax upon every person "who engages in the business of selling tangible personal property at retail in this state, or who uses or consumes in this state any item or article of tangible personal property" The design of the use tax is to complement the sales tax by taxing any article that is purchased in another state free from tax and then brought into Tennessee for use. The dredge subjected to tax by Tennessee was not taxed in any other state upon its acquisition. At the Tennessee courts have observed,

The use tax is complimentary to the sales tax and is applicable with respect to tangible personal property imported from outside the state and used by the importer within the state. Each such use is defined to be the equivalent of a sale at retail to which the appropriate tax should immediately apply.

Vector Company, Inc. v. Benson, 491 S.W.2d 612, 613 (Tenn. 1973).

The issue tried in this case below was whether the petitioner was exempted by Tennessee law pursuant to TENN. CODE ANN. § 67-6-321, which exempts a vessel from use tax so long as it is being used in interstate commerce. It is settled by the decision below that under Tennessee law, the dredge is not so exempted.

The taxpayer now turns to federal law and presents a Commerce Clause issue. It is the Commissioner's position that the dredging activities and storage of the *Lenel Bean* in Tennessee were localized events not in interstate commerce, and thus clearly subject to Tennessee's taxing power. Moreover, even if these events were regarded as being in interstate commerce, the instant tax may still be imposed under the rationale of *Complete Auto Transit*. Thus in no event is there a Commerce Clause violation.

B. The Dredging and Storage of the Lenel Bean were Localized Activities not in Interstate Commerce.

The record establishes that the *Lenel Bean* on numerous occasions has dredged in Tennessee waters. That it has also dredged in Mississippi or Arkansas is irrelevant. While the Mississippi River is quite clearly an artery of interstate commerce, and while the petitioner's dredging contributes to the navigability of that river, the dredging itself is a localized activity that is not a part of interstate commerce. Just as a road contractor would be subject to use tax upon his bulldozers used in repairing an interstate highway, petitioner is taxable for its dredging of the river.

Neither activity accords any immunity from state taxation. Many sorts of activities within a state may aid interstate commerce, but that does not make them a part of interstate commerce for purposes of state taxation.

A number of courts have considered this question and concluded with virtual unanimity that dredging is a localized activity. Perhaps the leading case is *Great Lakes Dredge & Dock Co. v. Department of Taxation and Finance*, 39 N.Y.2d 75, 346 N.E.2d 796, 382 N.Y.S.2d 958, cert. denied, 429 U.S. 832, 97 S. Ct. 95, 50 L. Ed. 2d 97 (1976), which is both factually and legally indistinguishable from the instant case. There a New Jersey dredge company had been assessed on two dredges and associated equipment used in New York operations, including the dredging of New York City's harbor. New York had a statute, exactly like Tennessee's, which exempted from use tax "vessels primarily engaged in interstate or foreign commerce" The New York Court of Appeals upheld a use tax assessment, and this Court denied certiorari. The factual setting of the case is remarkably similar to the instant one. The vessels were moved across state lines to reach a dredging site. While the dredge performed its work at a site, its tugboats and scows did cross state lines in hauling disposal materials to dump their loads. The intermediate appellate court struck the liability because the vessels were improving arteries of interstate travel and were continually moving from state to state. *Great Lakes Dredge & Dock Co. v. State Tax Commission*, 46 A.D.2d 533, 363 N.Y.S.2d 647 (1975). The state's highest court, however, reversed and found the dredge company subject to New York tax.

In upholding the tax, the highest court in New York wrote:

Nor can it be successfully contended that vessels and supplies used in dredging operations are still in the stream of interstate commerce or do not have a taxable moment in this State

346 N.E.2d at 798. The Court reasoned that while dredging vessels are mobile, the movement is incidental to the localized activity of dredging. Nor was it significant that work was performed on interstate waterways, since the dredging was a taxable local event, separate and distinct from interstate commerce.

Other cases adopting the same line of reasoning include *Atlantic Gulf & Pacific Co. v. Gerosa*, 16 N.Y.2d 1, 209 N.E.2d 86, 261 N.Y.S.2d 32, *appeal dismissed*, 382 U.S. 368, 86 S. Ct. 553, 15 L. Ed. 2d 426 (1965); *Great Lakes Dredge & Dock Co. v. Norberg*, 369 A.2d 1101 (R.I. 1977); and *Diversacon Industries, Inc. v. Graham*, 429 So. 2d 1269 (Fla. App. 1983). The petitioner's attempt to distinguish these cases by differentiating between types of dredges, such as between "dustpan," "clam shell," and "cutter-head" dredges, did not impress the Tennessee Supreme Court and bears no relevance to the real issues before this Court.

In addition, the anchoring of the dredge at McKellar Lake in Shelby County, Tennessee, for weeks or months at a time was not a part of interstate commerce and amounted to a taxable "storage". Tennessee's sales and use tax expressly applies not only to sales at retail, use, and consumption, but to storage of any tangible personal property within the State. TENN. CODE ANN. §§ 67-6-

201, 67-6-102(16). In this instance, the dredge was repeatedly anchored at McKellar Lake for periods varying from a few days to nine months. Even if interstate commerce were implicated, the anchoring of the dredge at McKellar Lake is clearly sufficient to remove the dredge from interstate commerce and make it subject to Tennessee's use tax.

Here the facts indicate that the *Lenel Bean*, when it has completed an assignment, anchors at McKellar Lake in Memphis, Tennessee to await its next assignment. The taxpayer refers to this as "standing-by;" its records consider it idle time. (Tr. 59; R. 27, Stipulation, Exhibit H). At periods when dredging is not needed on the Mississippi, such as during high water, the dredge may remain inactive at McKellar Lake for weeks or months at a time. McKellar Lake is the dredge's home base in the area, from which it goes forth to do particular assignments. During its periods at the lake, customary repairs or maintenance may be done. If the dredge is expected to remain idle for a considerable time, most of the crew is laid off. (Tr. 49, 60). No compensation is earned during these periods. These facts clearly reflect a taxable storage of the dredge in Tennessee.

The case law abundantly establishes that commerce may be interrupted in such manner as to create a taxable moment in a state. See *Minnesota v. Blasius*, 290 U.S. 1, 54 S. Ct. 34, 78 L. Ed. 1346 (1947); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 59 S. Ct. 389, 83 L. Ed. 586 (1939); *Nashville, C. & St. L. Railroad Co. v. Wallace*, 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730 (1933); *Master Craft Engineering, Inc. v. Dept. of Treasury*, 141 Mich.

App. 56, 366 N.W.2d 235 (1985). *Sunstrand Corp. v. Dept. of Revenue*, 34 Ill. App. 3d 694, 339 N.E.2d 351 (1975); *Vector Company v. Benson*, 491 S.W.2d 612 (Tenn. 1973). The docking of the *Lenel Bean* at McKellar Lake falls well within these categories. The dredge anchors, or docks, or stands by, at McKellar Lake upon finishing one assignment to await its next call. Repairs may be done in the interim. Most of the crew is laid off. While so docked, there is no certainty as to where the next place of employment will be, whether in Tennessee or another state. During one such period within the scope of the audit, the dredge remained idle for more than nine months, during which time no compensation was earned and no material was dredged. Obviously during such times the dredge is not in interstate commerce and is subject to Tennessee's use tax on storage.

Consequently, the localized dredging activity of petitioner in Tennessee and the storage of its vessel there are not part of interstate commerce and are fully subject to state taxation. The Commerce Clause is no impediment to such taxation, as embodied in the instant assessment. Just as this Court refused to review the *Great Lakes Dredge* case, it should decline review of the instant case. 429 U.S. 832, 97 S. Ct. 95, 50 L. Ed. 2d 97 (1976).

C. Even If the Taxpayer's Activities Were Regarded as Interstate Commerce, They are Subject to State Taxation.

If the activities in which Bean Dredging engages were treated as interstate commerce, they would still be subject to Tennessee's use tax. A state tax on interstate commerce is not unconstitutional per se. In *Complete Auto*

Transit, Inc. v. Brady, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 2d 326 (1977), this Court set forth four factors to determine the constitutionality of a state tax against a Commerce Clause challenge: (1) whether the tax is applied to an activity with a substantial nexus with the taxing state; (2) whether the tax is fairly apportioned; (3) whether the tax discriminates against interstate commerce; and (4) whether the tax is fairly related to the services provided by the taxing state. See *Wardair Canada, Inc. v. Florida Department of Revenue*, — U.S. —, 106 S. Ct. 2369, 2373, 91 L. Ed. 2d 1, 10 (1986). It is abundantly clear that the Tennessee tax meets each of these tests easily.

1. Petitioner's activity has a substantial nexus with Tennessee.

Petitioner's dredging activities occurred repeatedly within the boundaries of Tennessee, and the dredge was anchored in Tennessee for as long as nine months. The use tax has been imposed on the use of the dredge and its attendant plant in Tennessee. Thus it cannot be doubted that Tennessee has sufficient nexus with the activity being taxed.

2. The tax is fairly apportioned.

The instant tax is calculated on the value of the vessels used in Tennessee. A state clearly may base a tax on the value of property used within its borders. The use tax is a compensating tax that works in tandem with the sales tax. Tennessee levies its use tax only when property has not been subjected to sales or use tax in another state. One of the use tax statutes, TENN. CODE

ANN. § 67-6-210, expressly provides that there shall be no duplication of the tax in any event. As the Tennessee Supreme Court has repeatedly pronounced:

Thus, it was the legislative intent, as manifested in Section [67-6-210], T.C.A., to impose a use tax on all tangible personal property imported from other states and used and consumed in this state, provided a similar tax, equal to or greater, has not been paid in the exporting state.

Woods v. M.J. Kelley Co., 592 S.W.2d 567, 570 (Tenn. 1980); *Young Sales Corp. v. Benson*, 224 Tenn. 88, 450 S.W.2d 574 (1970).

If a sales or use tax had been paid on the *Lenel Bean* to another jurisdiction, Tennessee would have given credit for that tax, and there would have been no Tennessee tax. There is thus no possibility of multiple taxation in other states.

This is shown by the facts of the instant case. The petitioner after the assessment was made showed that sales tax of approximately \$1,333.75 had been paid to the State of Louisiana on one of the smaller ancillary vessels included in the assessment. R. 27, Stipulation, ¶ 9 and Exhibit I. The Commissioner promptly agreed to reduce the tax liability by this sum, plus attributable interest and penalty. The Tennessee Supreme Court recognized this in its decision and ordered the adjustment be made. 742 S.W.2d at 262. (Pet. App. 9-10).

The taxpayer's allegations of multiple taxation thus are obviously spurious. The tax is properly apportioned, since it is based on the value of the vessels used in Ten-

nessee, with respect to which no sales or use tax has been levied in any other jurisdiction.

3. The tax does not discriminate against interstate commerce.

Tennessee's sales and use taxes apply generally to items of tangible personal property, the sale or use of which occurs in Tennessee. There is no discrimination against interstate commerce because a dredge sold or used entirely within Tennessee would be subject to the sales or use tax at exactly the same rate as petitioner. Discrimination arises when an out-of-state taxpayer or transaction is subjected to a different tax than a similar in-state taxpayer or transaction. That clearly is not the case here.

Petitioner contends that the decision in *T.L. Herbert & Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976), is evidence of discrimination. Nothing could be further from the truth. The vessel in *Herbert* was used at all times to transport cargo moving in interstate commerce, and was therefore exempt from tax under TENN. CODE ANN. § 67-6-321. See 742 S.W.2d at 261. (Pet. App. 6). If anything, Tennessee under this statute discriminates in favor of those engaged in interstate commerce. As the court below noted, there is a substantial difference between transporting cargo (the prime example of interstate commerce) and a localized activity such as dredging. That *Herbert* involved a Tennessee corporation and this case

a Louisiana corporation had nothing to do with the results, as is apparent from the analyses of the Tennessee Supreme Court.

Thus it is manifest that the instant tax is not a result of discrimination against interstate commerce.

4. The tax is fairly related to services provided by Tennessee.

The imposition of use tax on petitioner's privilege of using the dredge in Tennessee is substantially related to the services Tennessee provides. During the dredge's long periods of docking in Tennessee, for instance, the crew uses the commercial and public facilities of Tennessee. The state and county provide police protection and access to the courts. The transportation facilities and roads of Tennessee are used to get the crew and supplies to and from the vessel. (Tr. 50). Even when the dredge is working in the river, its crew is subject to Tennessee criminal laws, and necessities are provided them from shore. The operators and crew are afforded the "advantages of a civilized society." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981). Thus there is no doubt that the tax on use of the dredge is fairly related to services provided by Tennessee in connection with the presence and use of the dredge in the state, under the *Commonwealth Edison* rationale.

Petitioner intimates that its performance under a federal contract with the U.S. Corps of Engineers is somehow relevant. There is no assertion, however, that petitioner was an agent of the United States so as to acquire any immunity from state taxation. Absent such incorporation into the governmental structure, federal contractors are fully subject to nondiscriminatory state taxation. See *United States v. New Mexico*, 455 U.S. 720, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982); *United States v. Boyd*, 378 U.S. 39, 84 S. Ct. 1518, 12 L. Ed. 2d 713 (1964).

For these reasons, even if the petitioner were deemed to be in interstate commerce, the instant use tax fully satisfies the test of *Complete Auto Transit*. Thus its imposition does not violate the Commerce Clause.

CONCLUSION

This case does not merit this Court's consideration. The Commerce Clause issue which the taxpayer now raises was conceded below and was not addressed by the Tennessee courts. Moreover, the tax has been imposed on activities that are not a part of interstate commerce and thus presents no constitutional question. Even if the taxpayer's activities are regarded as interstate commerce, the instant tax easily meets all elements of the *Complete Auto Transit* standard and is permissible under the Commerce Clause. This case does not present any novel questions of law. All the issues it involves have previously been firmly and correctly settled.

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

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APPENDIX

Opening Statements of Counsel
at Trial before the Chancery Court
of Shelby County, Tennessee, Part 3,
on May 6, 1986

(From the Transcript of the
Hearing, pages 4-12)

(p. 4) THE COURT: Gentlemen, did you all want to waive opening statement.

MR. RHODES: Let us make a brief opening statement.

THE COURT: Sure.

MR. RHODES: Your Honor, I'm Boyd Rhodes and joining me in representing the plaintiff is Mike Richards and also Mr. John Rouchell of the New Orleans bar. We'd ask that he be allowed to join us at the counsel table.

THE COURT: Sure.

MR. RHODES: Also in the courtroom is Eric Tanzenberger who is an officer of Bean Dredging Corporation.

This is a refund suit, your Honor, for Tennessee use taxes paid under protest. There are no issues regarding the procedural aspects of payment under protest or jurisdictional venue. It involves the application of Tennessee's exemption statute exempting from the use tax vessels of over 50 tons of displacement used in interstate commerce. There are only three criteria that we have to meet for that. The proof will show that all of those criteria are met.

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(p. 5) This vessel is a dredge. The dredging involves the dredge itself and some ancillary vessels which constitute the attendant plant. The attendant plant and everything must be in place in order to function as a dredge. You have to have the crew boat and the reconnaissance boat and the pipeline barges in order to transport material and fulfill the function of the dredge.

The dredge itself, the Lenel Bean is a special type of dredge called a dustpan dredge. It's specifically designed for use on the Mississippi River, specifically designed to rapidly move from one shoal area to another shoal area and to be able to rapidly move within the shoal area itself in order to allow other boats and vessels to pass during the dredging process.

The dredge transports the shoal material, the silt, through a pipeline to a discharge area. The discharge area where the material is transported to as well as the area that is dredged are both designated by the U.S. Corps of Engineers. There's a specific process, a specific surveying done to designate those portions and the witness will illustrate that.

These shoals usually occur where the (p. 6) channel of the river crosses from one side of the river to the other and as a result the Lenel Bean would typically be astride the border of the states in the Mississippi River when it's dredging. It would dredge from—the front of the vessel would be in one state and the discharge pipe would be in another state.

In addition, during the dredging process shore stations are set up on all banks. There are at least four and

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frequently more shore stations set up. And obviously these shore stations are in different states. And constant communication is maintained with those shore stations. It's sort of an automatic process which keeps the dredge itself precisely in the dredging area designated by the Corps of Engineers.

What we have is a continual communication across state lines. We frequently have an actual straddle of the vessel across state lines as it's dredging. And then the dredge itself, this particular special type of dustpan dredge, is actually under continual movement during the dredging process, it's not merely anchored in one spot for dredging.

There is a Corps of Engineers contract (p. 7) which directs this vessel where to dredge. The Corps of Engineers designates the sites. The Corps of Engineers actually has Corps personnel on board the vessel, the inspectors are on board, and the inspectors also carry with them Corps of Engineers equipment, radios and survey type equipment. And the Corps of Engineers considers these inspectors to be passengers while they are on board the vessel.

So in short, the Lenel Bean would transport material, the shoal material, it would also transport passengers, transports them on the Mississippi River, it transports them across state lines, and it's about as interstate commerce we feel as there can be.

There is one case, one New York case, which holds that a dredge is not in interstate commerce under an exemption statute similar to Tennessee's exemption, but that was on a specific finding of fact in that case that

the dredge itself never crossed the state lines. The dredge there was a clamshell dredge as opposed to a dustpan dredge. The clamshell dredge would lift the material from the bottom, put it into a vessel, into another scow, and that scow would go across (p. 8) state lines to discharge the dredged material. So it's a substantially different dredging operation than we have here on the Mississippi River.

On the plaintiff's side there is a Maryland case very much like the Tennessee exemption which clearly holds that the dredging operation is in interstate commerce.

The Commissioner will want to talk a lot about storage, that if the Lenel Bean ever was in interstate commerce, that once it is anchored down in McKellar Lake during high water, that that takes it out of interstate commerce and that constitutes storage of the vessel.

The proof will show that even when the Lenel Bean is down in McKellar Lake it maintains a crew on board 24 hours a day. The engines and generators are running 24 hours a day, seven days a week. Navigation lights, air conditioning, heating is maintained. And the vessel is actually moved from time to time depending on weather and the river stages, anchor lines are changed, the vessel literally moves down there, the crew moves the vessel, short distances, but it is moved.

Of course, the Herbert case even goes further and says under the Tennessee exemption (p. 9) statute even if a vessel comes to rest in Tennessee and even if a vessel becomes part of the mass of property in Tennessee the exemption still applies, it's still in interstate commerce within the meaning of the exemption.

The Lenel Bean during these periods of anchoring in McKellar Lake during high water—there's no proof whatsoever that the vessel was ever out of service, there's no mothballing, there's no dry docking, it's maintained in a full state of readiness to respond to Corps of Engineers' directions.

I would also state, your Honor, that we're not dealing here with United States constitutional limitations on taxation. We recognize that there are aspects of interstate commerce that states can tax. However, it's clear that the State of Tennessee has elected to exempt numerous activities from Tennessee taxation that could be taxed without violating the U. S. Constitution, and that's precisely what we have here. This exemption statute itself is an exemption from areas that could well be taxed without violating the U. S. Constitution. So we're not dealing with the constitutional (p. 10) limitations. And there are a number of cases that say you don't violate the U. S. Constitution by certain activities, but they are not in the face of an exemption statute such as Tennessee's. In particular, there's no case anywhere that's been cited in which any airplanes like the Federal Express case or trucks and trailers, where any of those items have been considered to be stored or taken out of interstate commerce in circumstances like we have in Bean where the crew remains on board at all times, where the generators are running 24 hours a day, the lights are maintained in operation and the vessel actually moves with the changes in weather and river stage.

A stipulation has been filed, a thick stipulation. There are no procedural matters at issue. Your Honor, we would also orally stipulate that Bean actually filed ap-

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propriate—actually filed sales and use tax returns for each of the years and periods at issue here. We suggest that all the proof and application of the law will show that the vessel is clearly within the Tennessee exemption statute and should not be taxed.

THE COURT: Thank you, sir.

MR. LEWIS: Your Honor, I am Larry (p. 11) Lewis representing the Commissioner of Revenue. Martin Giner of our office is assisting me today. Also we have here Virginia Adams of the Department of Revenue who will briefly testify. We would designate her as the department representative.

Let me briefly state, your Honor, that this is very simply a case of whether Bean Dredging has sufficient nexus with the State of Tennessee to be subject to use tax here on its dredges.

As the briefs note, this boils down to one or maybe two questions. That first question is whether or not the one dredge, the Lenel Bean, and its associated vessels are in interstate commerce within the meaning of TCA Section 67-6-321. We believe that dredging is a localized activity which certainly aids commerce but which is fully within the State's taxing powers and which is not within the stream of interstate commerce. I won't go into case authorities at this point. There are cases in a number of states including New York, Rhode Island and Florida and other jurisdictions that have long held that dredging is not interstate commerce.

Secondly, your Honor, we contend that (p. 12) when the dredge is anchored at McKellar Lake in Tennessee for

very considerable periods of time ranging from a few weeks to a few months to many months, that clearly it is not dredging during those periods, it is not in interstate commerce if it ever were in interstate commerce and, therefore, it is taxable.

In short, your Honor, we believe that the plaintiff here, Bean Dredging Corporation, has taken advantages of the waterways and facilities in Tennessee to conduct its very profitable business. It is not just, fair for it to use and keep its property here for extended periods of time without ever paying sales tax or use tax to this or any other jurisdiction. It is our assertion that the Tennessee statute does not and was never intended to exempt an activity of this sort which is localized and by several authorities it is not in interstate commerce.

Thank you, your Honor.

THE COURT: Thank you, sir.

Let's please proceed with the first witness.

No. 87-1508

In The
Supreme Court of the United States
October Term, 1987

BEAN DREDGING CORPORATION,

Petitioner,

vs.

MARTHA B. OLSEN, COMMISSIONER OF REVENUE
OF THE STATE OF TENNESSEE,*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE WEST-
ERN GRAND DIVISION AT JACKSON

PETITIONER'S REPLY BRIEF

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**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE
WESTERN GRAND DIVISION AT JACKSON**

PETITIONER'S REPLY BRIEF

Petitioner, Bean Dredging Corporation, hereby responds to the Brief In Opposition to Petition for Writ of Certiorari filed on behalf of Respondent, Martha B. Olsen, Commissioner of Revenue of the State of Tennessee.

ARGUMENT

PETITIONER TIMELY RAISED THE COMMERCE CLAUSE ISSUE BEFORE THE TENNESSEE STATE COURTS AND THIS COURT HAS JURISDICTION OF THE ISSUE.

This Honorable Court has jurisdiction of the Commerce Clause issue more fully set forth in the Petition for Writ of Certiorari under 28 U.S.C. § 1257. The erroneous characterization of Petitioner's dredging activities as inherently "local" by the Tennessee Supreme Court, coupled with Respondent's out-of-context quotation and characterization of certain comments by Petitioner's trial counsel as a "waiver" of Petitioner's constitutional rights under the Commerce Clause is an effort to circumvent the jurisdiction of this Honorable Court to the prejudice of Petitioner's constitutional rights for the following reasons.

I. Petitioner Specifically Pled the Commerce Clause.

Petitioner's original Complaint for refund of taxes is based upon two alternative theories. First, the use tax is inapplicable to Petitioner based upon the clear and unequivocal wording of Tennessee law, more particularly Tenn. Code Ann. § 67-6-321 (formerly Tenn. Code Ann. § 67-3012) and the holding of *T.L. Herbert & Sons, Inc. v. Woods*, 539 S.W. 2d 28 (Tenn. 1976), regardless of federal constitutional principles. Second, and alternatively, imposition of the use tax on Petitioner would violate the Commerce Clause of the United States Constitution. Petitioner specifically pled this alternative

argument and directly invoked the protection of the Commerce Clause in its original Complaint as follows:

12. Pursuant to TCA § 67-3012(8)(a) which specifically exempts the use of vessels or barges of fifty tons and more displacement so long as they are being used in interstate commerce, vessels used by Plaintiff in excess of fifty tons displacement are exempt from taxation and any imposition of use taxes on these vessels is erroneous, illegal and void.
13. The imposition of use taxes by the State of Tennessee on dredging vessels used in interstate commerce within and without this State is an unconstitutional encroachment on the power of the Congress of the United States to regulate commerce among the several states under Article I, Section 8 of the United States Constitution.

See Appendix 80, Par. 12 and 13, to Petitioner's Petition for Writ of Certiorari.

In each case cited by Respondent for the proposition that this Honorable Court has no jurisdiction over the Commerce Clause issue, every aggrieved party alleging violation of constitutional rights either failed to invoke the Constitution in its pleadings or raised a new and different constitutional argument for the first time in the Petition for Writ of Certiorari. Only *Tacon v. Arizona*, 410 U.S. 351, 35 L.Ed 2d 346, 93 S. Ct. 998 (1973) purports to involve a waiver of previously pleaded constitutional rights. In fact, a close reading of *Tacon* reveals that the case does not involve the waiver of a constitutional right at all. Rather, petitioner in *Tacon* pleaded at trial that no waiver occurred under Arizona's Rules of Criminal Procedure. Petitioner in

Tacon invoked its federal right to confrontation under the Sixth and Fourteenth Amendments for the first time before this Honorable Court.

Petitioner, Bean Dredging Corporation, specifically pleaded and invoked the protection of the Commerce Clause in its original Complaint.

II. The Tennessee Tax Statute is Constitutional on its Face.

Petitioner's trial counsel only conceded that the Tennessee Tax Statute, *on its face*, does not attempt to extend the State's taxing powers beyond the parameters permitted by the Commerce Clause. The Statute, *on its face*, does not tax vessels and barges of 50 tons or over of displacement purchased for use in interstate commerce or for use outside the State of Tennessee so long as such vessels are being used in interstate commerce:

67-6-321. *Railroad stock - vessels and barges.* - There shall be exempt from sales tax the transfer, by any dealer in personal property, of railroad rolling stock or of vessels or barges of fifty (50) tons or over of displacement where the purchaser gives the seller an affidavit that such vessels or rolling stock are being purchased for use in interstate commerce or outside the State of Tennessee; and any such vessel or rolling stock shall also be exempt from use tax so long as it is being used in interstate commerce. (Formerly Tenn. Code Ann. § 67-3012).

See Appendix 217 to Petitioner's Petition for Writ of Certiorari.

Obviously, if the State of Tennessee does not tax vessels of fifty tons of displacement or over while in

interstate commerce, the statute on its face cannot violate the Commerce Clause. Comments of Petitioner's trial counsel were merely an effort to clarify the issues for Chancellor Allisandratos. When taken in its full context, the comments of Petitioner's trial attorney were not a waiver of Petitioner's constitutional rights, but rather an assertion that the tax, as applied to Petitioner, could be ruled illegal as a matter of Tennessee statutory law and the only prior interpretation of those laws in the maritime industry as set forth in *T.L. Herbert & Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976), whether or not the statute was constitutional on its face. Waiver of constitutional rights is never treated cavalierly, and this Court indulges every presumption against such a waiver. *Ohio Bell Tel. Co. v. Commissioner*, 301 U.S. 292, 81 L.Ed. 1093, 57 S. Ct. 724 (1937).

III. The Trial Court Ruled for Petitioner Based on Tennessee Law.

Chancellor Allisandratos ruled the Tennessee use tax inapplicable to the facts of this case under Tennessee law:

This Court is of the opinion that while it is helpful to have the thoughtful analysis of sister states and their opinions from their courts that this Court must look first to the law as set out by the courts of Tennessee. This Court, therefore, relies heavily upon the *Herbert & Sons versus Woods* case that has been cited by both parties.

In reviewing the facts of this case and the facts of that case I find that the plaintiffs in this cause were engaged in interstate commerce. I find that

the entire scope of their activity was for the furtherance of preserving the navigation of the entire waterways, and I see no distinction between that and one who would avail themselves of those waterways simply for the purpose of transporting either goods or services across them.

With regard to the argument propounded by the Commissioner as it relates to storage, this Court does not believe that the statute contemplates the facts as in this case. Again relying on the Herbert case, I would point out that indeed in this case the only reason I find that this vessel was not actually docked in Tennessee is because there was no dock suitable enough for it to be docked. It created a man-made dock. For all practical purposes, it was docked. But it was not here in the capacity of storage as within the meaning of the statute I do not believe. It was here temporarily. And while that temporary time may have at times seemed somewhat frequent, it was only as a result of the condition of the river the vast majority of the time that it caused it to remain in its man-made dock. I see that as no different than the Herbert case.

The primary mission of the plaintiffs in this case and the purpose was to conduct interstate activity and its contacts with Tennessee were only for the purpose of the furtherance of that activity. Therefore, I will grant judgment in favor of the plaintiffs, costs to be assessed against the defendants.

See Appendix 38 and 39 to Petitioner's Petition for Writ of Certiorari.

Chancellor Allisandratos properly ruled the tax inapplicable based upon Tennessee law and did not refer to the Commerce Clause for it was entirely unnecessary, even though timely pleaded by Petitioner. The scope of Respondent's appeal to the Tennessee Supreme Court was likewise confined to a review of Chancellor

Allisandratos's findings of fact and conclusions of law. The Commerce Clause was neither briefed nor argued in the Tennessee Supreme Court because the issue at that point was focused on Tennessee law. The cases cited by Respondent in its Brief in Opposition to the Petition for Writ of Certiorari involved lower court judgments adverse to the applicants for certiorari followed by a subsequent failure by those parties to raise federal constitutional issues and protections before the highest state court in the appeal process.

Clearly, Petitioner had no need to raise these constitutional issues before the Tennessee Supreme Court because the decision of the trial court was based solely upon the interpretation and application of the Tennessee Statute in the light of *Herbert*. Nevertheless, the application of the Commerce Clause raised by Petitioner in its Complaint remained a viable alternative argument against the unconstitutional application of a statute which was constitutional on its face. Petitioner should not be prejudiced now for maintaining proper judicial economy before the Supreme Court of Tennessee.

IV. The Tennessee Tax Statute As Interpreted By the Tennessee Supreme Court and Enforced by Respondent in This Case Violates Petitioner's Rights Under the Commerce Clause.

It is well established that this Court has jurisdiction to review an interpretation of State law by a state's highest court where the state court decision rests on an incorrect perception of an interrelated federal law. In

this case the Tennessee Supreme Court's erroneous characterization of Petitioner's dredging activities as inherently "local" incorrectly places the activity outside the federal definition of interstate commerce as protected by the Commerce Clause. *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 81 L.Ed. 2d 113, 104 S. Ct. 2267 (1984).

Only when the Tennessee Supreme Court rendered its Judgment against Petitioner did the Tennessee Tax Statute become unconstitutional *in operation*, albeit constitutional *on its face*.

The facts of the instant case are indistinguishable from *Herbert* except that the State of Tennessee taxes Louisiana businesses coming into the state but absolves Tennessee residents from the tax in a patently discriminatory manner in violation of three of the four principles of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed. 2d 326, 97 S. Ct. 1076 (1977), all as more fully set forth in the Petition for Writ of Certiorari.

CONCLUSION

Under the facts and circumstances of this case, Petitioner has preserved its rights under the Commerce Clause of the United States Constitution and the jurisdiction of this Honorable Court. The Tennessee use tax as applied to the Petitioner under the facts of this case and as enforced by Respondent violates the Commerce Clause.

For the foregoing reasons, as well as those which have been urged in the Petition, a Writ of Certiorari should be granted.

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